EDITOR'S NOTE

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No. 84-1479-CFH
Status: GRANTED

Docketed:
March 18, 1985

Title: R. H. Kuhlmann, Superintendent, Sullivan Correctional Facility, Petitioner
v.
Joseph Allan Wilson

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Merola,Mario

Counsel for respondent: Wilson,Joseph Allan

Entry	Date	Note	Proceedings and Orders
1	Mar 18 1985	G	Petition for writ of certiorari filed.
2	Apr 24 1985		DISTRIBUTED. May 9, 1985
3	Apr 30 1985	P	Response requested.
4	May 31 1985		Brief of respondent Joseph Allan Wilson in opposition filed.
5	May 31 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Jun 4 1985		REDISTRIBUTED. June 20, 1985
7	Jun 24 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Jun 24 1985		Petition GRANTED.
			**********
10	Jul 17 1985		Order extending time to file brief of petitioner on the merits until August 26, 1985.
11	Aug 28 1985		Joint appendix filed.
12	Aug 29 1985		Order further extending time to file brief of petitioner on the merits until August 29, 1985.
13	Aug 29 1985		Brief of petitioner Robert J. Henderson, Supt. filed.
15	Sep 9 1985		Order extending time to file brief of respondent on the merits until November 4, 1985.
16	Sep 16 1985		Application for leave to file petitioner's brief on the merits in excess of the page limits, and order
17	Sep 16 1985		granting same by Marshall, J., on September 18, 1985. The brief may not exceed 55 printed pages.
19	Oct 24 1985		Order extending time to file brief of respondent on the merits until November 25, 1985.
20	Nov 9 1985		Record filed.
21	Nov 21 1985		SET FOR ARGUMENT, Tuesday, January 14, 1986. (3rd case).
22	Nov 25 1985		Record filed.
23	Nov 26 1985		Brief of respondent Joseph Allan Wilson filed.
24	Dec 5 1985		CIRCULATED.
25	Jan 6 1986	X	Reply brief of petitioner Robert J. Henderson, Supt. filed.
26	Jan 14 1986		ARGUED.

84-1479 (1)

No.

IN THE

Supreme Court of the United States

October Term 1984

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether, in the absence of an intervening change in the law or any other compelling factor, principles of finality of habeas corpus litigation preclude a federal court from reconsidering an issue that has been fully adjudicated by the federal district and appellate courts pursuant to a previous petition for a writ of habeas corpus.

2. Whether repetitious federal review of an issue raised in a successive petition by which a person in state custody challenges a final state judgment necessarily fails to serve the "ends of justice" where, pursuant to a previous petition for a writ of habeas corpus, the same issue received plenary consideration, was fully adjudicated by the federal district and appellate courts and was found by this Court not to warrant a writ of certiorari; where there has been no intervening change in the law; where the claimed constitutional error does not give rise to a substantial question as to the validity of the determination of guilt; and where no other compelling factors have been identified or established.

3. Whether a judgment of the Court of Appeals for the Second Circuit must be vacated where, without applying the presumption of correctness mandated by 28 U.S.C. § 2254 (d) and without complying with the requirement, announced by this Court in *Sumner* v. *Mata*, 449 U.S. 539 (1981), to explain in writing why one of the exceptions enumerated in § 2254(d) was deemed applicable, the Court of Appeals relied upon its own findings of fact, which are contrary to those of a state hearing court as well as to those of two fed-

eral district courts and a majority of a prior panel of the same Court of Appeals.

4. Whether the presumptively correct state court finding that Wilson's inculpatory jailhouse statement to an undisclosed government agent was spontaneous and not deliberately elicited—a finding supported by direct and uncontradicted hearing testimony regarding the circumstances surrounding the statement—negates the inference of deliberate eliciting that, under *United States* v. *Henry*, 447 U.S. 264 (1980), might be drawn in the absence of such direct evidence.

5. Whether, if *United States* v. *Henry*, 447 U.S. 264 (1980), represented a change in the law sufficient to warrant the Second Circuit's reversal of its own prior judgment, it should be deemed a new rule of law and should not be applied retroactively in a habeas corpus proceeding.

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No.

IN THE

Supreme Court of the United States

October Term, 1984

HON. ROBERT J. HENDERSON,
Superintendent: Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 27, 1984.

Opinions Below

The opinion of the Court of Appeals, *Wilson* v. *Henderson,* —— F.2d ——, is appended hereto as Appendix A. That Court's order, entered December 17, 1984, denying a petition for rehearing and suggestion for rehearing en banc is not yet reported and appears as Appendix B. The

unreported decision of the District Court for the Southern District of New York may be found in Appendix C.

Prior to the present proceeding, the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit considered and rejected respondent's original petition for a writ of habeas corpus which raised, *inter alia*, precisely the same factual and legal issue that was raised in the present proceeding. The relevant portions of the earlier unreported decision of the District Court and of the prior opinion of the Court of Appeals, which is reported at 584 F.2d 1185, as well as that Court's denial of a petition for rehearing and suggestion for rehearing en banc, which is reported at 590 F.2d 408, are appended hereto as, respectively, Appendix D, Appendix E, and Appendix F. This Court's denial of a petition for certiorari in the earlier proceeding is reported at 442 U.S. 945.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 27, 1984. A timely petition for rehearing and suggestion for rehearing en banc was denied on December 17, 1984, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty nor property without due process of law . . .

United States Code, Title 28, section 2254(d) provides that:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

United States Code, Title 28, section 2244(b) provides, in pertinent part:

> When . . . after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States releases from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person

> need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Rule 9(b) of the Rules Governing United States Code, Title 28, section 2254 provides:

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Statement of the Case

I. Wilson's Admission to an Undisclosed Informant

In the early morning of July 4, 1970, Joseph Allan Wilson and two others committed a robbery at the Star Taxicab Garage, during which Sam Reiner, the dispatcher on duty, was shot and killed. Three employees observed Wilson, who had formerly worked at the garage, on the premises just before the murder and two of them saw him fleeing from the scene of the crime cradling money in his arms.

On July 7, 1970, Detective Walter Cullen told Benny Lee, an inmate of the Bronx House of Detention, that he expected to arrest Wilson soon, that he would place Wilson

in Lee's cell, and that he would like for Lee to listen to Wilson for the sole purpose of learning the identities of Wilson's two accomplices. Detective Cullen specifically instructed Lee that he was not to "question the man in any way". Without entering into any agreement with the police or receiving any promise regarding compensation for providing information, Lee indicated that he would perform the requested service.

Shortly thereafter, Wilson, having been arrested and arraigned, was moved to Lee's cell, which was in a cellblock from which the Star Taxicab Garage was visible. Upset by the view, Wilson began discussing his pending charges with Lee, and asserted, as he had in a previous statement to Detective Cullen, that he had observed two strangers commit the robbery and murder and that he had simply picked up some money that they dropped. Lee remarked that the story "didn't sound too good" and that "things didn't look good" for Wilson.

Several days later, Wilson was visited by his brother, also an employee of the Star garage, who conveyed to Wilson that their family was distraught over his role in the killing of Sam Reiner. Lee observed that "this upset him very much and that would start him to talking about different things, about the crime and different things". Shortly after that disturbing visit, Wilson admitted to Lee that he had planned the robbery with the other two men. that "[w]e shot the man," and that, afterwards, "[w]e picked up the money and left."

II. The State Court's Decision

Following a pre-trial evidentiary hearing, the state court denied Wilson's motion to suppress the statement. That ruling was based upon the court's factual determinations: (1) that Lee was instructed to ask no questions, but only to listen to what Wilson said; (2) that Lee followed those instructions; and (3) that the statements Wilson made to Lee were unsolicited and voluntarily made. After the trial, at which Wilson's statement to Lee was introduced, the Appellate Division, First Department, of the Supreme Court of the State of New York, unanimously, and without opinion, affirmed Wilson's conviction, *People* v. *Wilson,* 41 A.D. 2d 903, 343 N.Y.S.2d 563 (1974). The Court of Appeals of the State of New York denied Wilson's application for leave to appeal.

III. The First Petition for a Federal Writ of Habeas Corpus

In his original petition for a writ of habeas corpus, Wilson claimed that the admission at trial of his statements to Lee violated his constitutional rights. The District Court for the Southern District of New York, after citing *Massiah* v. *United States,* 377 U.S. 201 (1964), rejected this claim because "[t]he record indicates that there was no interrogation whatsoever by the undercover agent only spontaneous statements offered by petitioner." Appendix D, p. 32a). On his appeal from the District Court's order denying his petition for a writ of habeas corpus, Wilson, who was represented by counsel, again argued that the statements to Lee were deliberately elicited in violation of *Massiah.* The Court of Appeals for the Second Circuit, by a two-judge

majority, rejected that claim, holding that "there must be some circumstance more than the mere absence of counsel before a defendant's post-indictment statement is rendered inadmissible." *Wilson* v. *Henderson,* 584 F.2d 1185, 1190 (2d Cir. 1978) (Appendix E, p. 38a). The court distinguished Wilson's case from *Brewer* v. *Williams,* 430 U.S. 387 (1977), in which this Court found that a police officer deliberately elicited incriminating statements even though he did not interrogate the defendant, because "Lee did not interrogate Wilson, *nor in any way attempt to deliberately elicit incriminating remarks . . .*" [emphasis added]. 584 F.2d at 1191 (Appendix E, pp. 40a-41a).

A subsequent application for a rehearing en banc was denied, *Wilson* v. *Henderson,* 590 F.2d 408 (2d Cir. 1979) (Appendix F), and this Court denied a petition for certiorari. *Wilson* v. *Henderson,* 442 U.S. 945 (1979).

IV. The Second Petition for a Federal Writ of Habeas Corpus

A new round of litigation regarding the constitutionality of Wilson's statement to Lee was prompted by *United States* v. *Henry,* 447 U.S. 264 (1980), *aff'g.*, 590 F.2d 544 (4th Cir. 1978), in which this Court affirmed the Fourth Circuit's decision—which had been published prior to the denial of Wilson's suggestion for rehearing—holding that, under the circumstances of that case, a government agent's jailhouse conversation with the accused constituted "deliberate elicitation" in violation of the principles announced in *Massiah.*

After a New York State court found that *Henry* was factually distinguishable from Wilson's case and, therefore, that it did not support his motion for post-judgment relief, and after Wilson's applications for further state appellate review were denied, he filed a second petition for a writ of habeas corpus. As before, Wilson claimed that his statements to Lee were deliberately elicited in violation of the Sixth Amendment; the only new wrinkle was Wilson's assertion that *Henry* changed the constitutional standard for determining when a statement is "deliberately elicited" and rendered invalid the previous determination that the statement was obtained constitutionally.

In opposition, the state argued that *Henry* did not alter the constitutional principles and standards that were applied when Wilson's original petition was adjudicated and, therefore, that his successive petition on identical grounds should be dismissed; that the present case is factually distinguishable from *Henry*; and that, if *Henry* did promulgate a new constitutional rule, it should not be applied retroactively.

The District Court did not address the contention that Wilson's successive petition constituted an abuse of the writ, but proceeded to an independent examination of the record, from which it reported the following findings of fact:

> . . . [U]nlike the record in *Henry,* the record in the instant case does not support the inference that the government informant affirmatively secured the incriminating information from the accused. In fact, the instant record plainly establishes that petitioner's incriminating statements were spontaneous and were not elicited in any way by the government informant. The

testimony at the *Huntley* hearing established that petitioner's initial false exculpatory statements to Lee were a spontaneous response to petitioner's view of the Star Taxicab Garage from his cell window, and that petitioner's ultimate confession to Lee was a spontaneous response to a disturbing visit petitioner received from his brother. (Appendix C, pp. 27a-28a).

Based on those findings, the District Court rejected Wilson's claim and dismissed his petition.

On appeal, a two-judge majority of the Court of Appeals for the Second Circuit declared that, "notwithstanding that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the 'ends of justice' require a consideration of the merits of his present application" (Appendix A, p. 6a). Without any reference to the District Court's finding that the confession was a spontaneous response to the disturbing visit by Wilson's brother, the Second Circuit rejected the District Court's finding, and, implicitly, the underlying state court finding, that Wilson's statements were not deliberately elicited by Lee (Appendix A, pp. 9a-10a). Finally, the panel majority concluded that, although *Henry* worked so substantial a change in Sixth Amendment analysis that it warranted the invalidation of the prior decision of the Second Circuit, it did not establish a "new" constitutional rule for purposes of determining whether it should be applied retroactively [*cf. Stovall* v. *Denno,* 388 U.S. 243 (1967); *Linkletter* v. *Walker,* 381 U.S. 618 (1965)] (Appendix A, pp. 12a-16a). The majority thereupon reversed the District Court's order.

In dissent, Circuit Judge Van Graafeiland noted that the majority had, without explanation, relied upon factual

findings contrary to those of every court that had previously considered this case, including the state court's findings, which, under *Sumner* v. *Mata,* 449 U.S. 539 (1981), are entitled to a presumption of correctness (Appendix A, pp. 18a-19a). The dissenter concluded that "... my colleagues have failed to demonstrate that the many judges who previously have rejected [Wilson's] contentions erred in so doing, and have relied solely on a talismanic reference to the 'ends of justice' in getting around both the provisions of [United States Code, Title 28] section 2254(d) and the limitations on repetitive habeas corpus applications. ..." (Appendix A, pp. 19a-20a).

REASONS FOR GRANTING THE WRIT

POINT ONE

Review of the Second Circuit's judgment in this case will provide this Court an opportunity to clarify and define, as it never has before, the limits of a federal court's power to upset a state court judgment that has previously survived a federal habeas corpus challenge on identical constitutional grounds; in so doing, this Court may eliminate a source of pervasive and continuing tension between the federal government and the states.

In announcing its rejection of the factual conclusions underlying the District Court's ruling in the present case, the Second Circuit employed two words: "We disagree." (Appendix A, p. 9a). Absent from its terse statement was any explanation of why it concluded that the presumption of correctness [28 U.S.C. 2254(d)] should not apply to the state court's factual determinations, even though those

findings, based upon an uncontradicted record, had been accepted and confirmed by both of the district judges who had previously considered the merits of Wilson's Sixth Amendment claims as well as by the majority of the prior Second Circuit panel which had ruled that the statement in question was constitutionally obtained. The Court of Appeals achieved a similar economy of language when, having observed that *United States* v. *Henry,* 447 U.S. 264 (1980), the case upon which Wilson premised his second petition for a writ of habeas corpus, "merely applied settled precedent to a new factual situation," (Appendix A, p. 12a), it declared that, "notwithstanding that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the 'ends of justice' require a consideration of the merits of his present application" (Appendix A, p. 6a). This cursory remark was not accompanied by any indication of how repeated review of Wilson's claim would serve the "ends of justice." Thus, the savings in verbiage reflected in the Second Circuit's opinion were secured at great cost to the principles of deference to state court determinations and finality of judgments. Review of this case will enable this Court both to repair the harm done to those principles here and, more importantly, to provide much-needed guidance to the federal courts, and assurance to the states, regarding the limits on the federal courts' power to compel a state to relitigate a previously resolved issue on successive petitions for habeas corpus.

The Second Circuit's unquestionable failure to accord the state court findings the deference to which they are entitled under 28 U.S.C. § 2254(d) and its blatant disregard of this Court's explicit requirement of a written explanation

for a federal court's reliance upon contrary factual determinations, *Sumner* v. *Mata,* 449 U.S. 539 (1981), clearly warrant exercise of this court's supervisory powers. *See e.g. Marshall* v. *Lonberger,* 459 U.S. 422 (1983); *Sumner* v. *Mata,* 455 U.S. 591 (1982). Indeed, a grant of certiorari in a case such as this provides the only mechanism by which this Court can give weight and effect to its command that the federal courts accord a high measure of deference to state court findings. Moreover, although review of the Second Circuit's failure to apply the presumption of correctness alone would, concededly, break no new ground for this Court, the Court of Appeals' error in this respect was joined here by a larger disregard for the interests which 28 U.S.C. § 2254 was designed to advance: the interests in minimizing the friction between the state and federal courts and in insuring that there will at some point be an end to litigation. *See Sumner,* 449 U.S. at 550. The Second Circuit's determination, for no articulated reason, to reconsider a claim which it had previously rejected on the merits presents this Court with an opportunity to apply the concerns for finality and minimization of federal-state conflict that it has consistently recognized in its recent decisions to a significant subject that the Court has not addressed in over twenty years (and then only in *dicta*): the extent of a federal court's powers in ruling upon an issue raised in a successive petition for a writ of habeas corpus.

This Court last addressed the problem of successive habeas corpus petitions in *Sanders* v. *United States,* 373 U.S. 1 (1963). There, in *dicta,* the Court indicated that federal courts are armed with the discretionary power to deny a habeas corpus petition without reaching its merits

if the ground raised was previously considered on the merits, if it was resolved adversely to the applicant, and if "the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. at 15. The Court further suggested that the applicant bears the burden of showing that, because he was denied a full and fair hearing on the prior application, or because of an intervening change in the law, or because of some other factor, the "ends of justice" would be served by reconsideration of the previously rejected ground.[1]

Although *Sanders* implies that a previously rejected ground for habeas corpus relief should not be reconsidered in the absence of some factor showing that review would serve the ends of justice, it stops short of mandating dismissal of a successive petition in the absence of any such factor. It must be noted in this regard that the actual holding of *Sanders* was limited to the ruling that *res judicata* does not bar a federal prisoner's second motion for resentencing pursuant to 28 U.S.C. § 2255. Thus, the *Sanders* court did not address the particular concerns that come into play when a federal court reviews the final judgment of a state court. Petitioner therefore suggests that the limited holding of *Sanders* should be re-evaluated, with an eye toward its expansion, in accordance with the principles of finality and deference to the role of the states in the federalist system that this Court has consistently recognized during the two decades since *Sanders* was decided.

1. The "abuse of the writ" principles discussed in *Sanders* are codified in 28 U.S.C. § 2244(b) and in rule 9(b) of the Rules Governing 28 U.S.C. § 2254.

Those principles were discussed at some length in *Engle* v. *Isaac,* 456 U.S. 107, 126-28 (1982):

> We have always recognized, however, that the Great Writ entails significant costs (footnote omitted). Collateral review of a conviction extends the ordeal of trial for both society and the accused. As Justice Harlan once observed, "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States,* 373 U.S. 1, 24-25 (1963) (dissenting opinion). See also *Hankerson* v. *North Carolina,* 432 U.S., at 247 (POWELL, J., concurring in judgment). By frustrating these interests, the writ undermines the usual principles of finality of litigation (footnote omitted).
>
> Liberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one "time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Wainwright* v. *Sykes,* [433 U.S. 72] at 90. Our Constitution and laws surround the trial with a multitude of protections for the accused. Rather than enhancing these safeguards, ready availability of habeas corpus may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself.
>
> We must also acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory,

entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution.

Finally, the Great Writ imposes special costs on our federal system. The states possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. *See Schneckloth* v. *Bustamonte,* 412 U.S. 218, 263-265 (1973) (POWELL, J., concurring) (footnote omitted).

In *Barefoot* v. *Estelle* —— U.S. ——, ——, 103 S.Ct. 3383, 3391 (1983), the court observed that:

> "When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.

More recently, the Court has distinguished between habeas corpus litigants and those whose cases are pending on direct review, noting that:

> The one litgant has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not drawn. Somewhere, the closing must come.

Shea v. *Louisiana,* —— U.S. ——, ——, 53 U.S.L.W. 4173, 4175 (Feb. 20, 1985). *See also Solem* v. *Stumes,* —— U.S. ——, ——, 104 S.Ct. 1338, 1345 (1984) ("At a minimum,

non-retroactivity means that a decision is not to be applied in collateral review of final convictions"); *Stone* v. *Powell,* 428 U.S. 465 (1976) (restricting substantive scope of habeas corpus jurisdiction in Fourth Amendment cases).

If, notwithstanding the interest in finality that this Court has so clearly articulated, *Sanders* may be viewed as permitting a federal court to reconsider a claim that has previously been litigated at every level of both the state and federal judicial systems even though there has been no intervening change in the law and no other factors have been cited in support of the claim that further review will serve the "ends of justice," then surely it is time for the guidelines announced in *Sanders* to be re-evaluated. Petitioner proposes that, consistently with the pronouncements cited above, this Court should declare, as a corollary to the suggestion in *Sanders* that a claim that has been decided adversely to a habeas corpus applicant on a prior application can be denied further federal review only if such review would not serve the ends of justice, that such a claim can receive further federal review only if such review would serve the ends of justice. Additionally, petitioner would suggest a requirement that a federal court's conclusion that the ends of justice would thus be served be supported by articulable objective factors relating to the particular case in question and that the court's "ends of justice" analysis include both an examination of the extent to which the alleged constitutional violation impugns the determination of guilt and a consideration of the hardships that further review would impose on the state. *See Walker* v. *Lockhart,* 726 F.2d 1238 (8th Cir.) (en banc), *cert. denied,* —— U.S. ——, 104 S.Ct. 2168 (1984) (Analysis of such considerations, in addition to the *Sanders* analysis, supported district court's refusal to reconsider previously rejected grounds

for habeas corpus relief because "[c]onsideration of the ends of justice involves not only the interest of the accused in justice but the interest of the public in justice").

Indeed, the Second Circuit itself, in a decision which conflicts directly with the approach it took in the present case, has advocated such an expansion of the *Sanders* doctrine. In *United States ex rel. Schnitzler,* 406 F.2d 319 (2d Cir.), *cert. denied,* 395 U.S. 926 (1969), the Court of Appeals reversed the order of a district judge who, without offering any justification, reached the merits of a petition that was identical to one that the Second Circuit had previously rejected. Recognizing that federal habeas corpus jurisdiction over state prisoners is "a branch of jurisprudence which is badly in need of some principles of finality," 406 F.2d at 322, the Second Circuit declared that "[n]ot only is it clear that under the *Sanders* standard the district court could have refused to entertain this second application for habeas corpus relief (citation omitted), but we hold that in light of the prior decision of this court the district court was *required* not to entertain this application" [emphasis added]. 406 F.2d at 321. Thus, review by this Court would resolve the conflict between the present case and the Second Circuit's own precedent.

The Seventh Circuit has also found support in *Sanders* for ruling that a district court abused its discretion by considering the merits of a successive petition despite the absence of a change in the factual or legal background of the previously rejected claim. *United States ex rel. Townsend* v. *Twomey,* 452 F.2d 350 (7th Cir.), *cert. denied,* 419 U.S. (1972). Similarly, the Eleventh Circuit has cited *Sanders* in support of its pronouncement that a successive habeas

corpus petition "should be entertained *only if* the ends of justice so require [emphasis added]." *Adams* v. *Wainwright,* 734 F.2d 51 (11th Cir. 1984). Thus, it is clear that the extension of the *Sanders* standard that petitioner proposes follows logically from the principles discussed in that opinion.

It remains for this Court, however, to fashion a rule of general application that, in addition to suggesting when a federal court may consider a successive application, as *Sanders* has done, will clearly denominate those circumstances in which it may not. Drawing such a line of demarcation will at once clarify the role of federal courts in adjudicating habeas corpus petitions and assuage the fear of the states that, even after running the gantlet of federal review, their judgments will still stand in perpetual jeopardy. Moreover, adopting such a rule would enable this Court to give effect to the principles espoused by Professor Bator in *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441 (1963), an article that has been cited frequently by members of this Court. [*See, e.g. Engle* v. *Isaac,* 456 U.S. 107, 127 n. 32 (1982); *Rose* v. *Mitchell,* 443 U.S. 545, 580 n. 1 (1979) (Powell, J. concurring); *Jackson* v. *Virginia,* 443 U.S. 307, 337 n. 12 (1979) (Stevens, J. concurring); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 253-55 (1953) (Powell, J. concurring)]. There, it was suggested that:

> The presumption must be, it seems to me, that if a job can be well done once, it should not be done twice. If one set of institutions is as capable of performing the task at hand as another, we should not ask both to do it. The challenge really runs the other way: if a proceeding is held to determine the facts and law in a case,

> and the process used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repitition and second-guessing, why should not the first proceeding "count"? Why should we duplicate effort? After all, it is the very purpose of the first go-around to decide the case. Neither it nor any subsequent go-around can assure ultimate truth. If, then, the previous determination is to be ignored, we must have some reasoned institutional justification why this should be so.

76 Harv. L. Rev. at 451. As the present case demonstrates, there is no existing rule of this Court precluding a federal court from unjustifiably permitting a second go-around to be followed by a third, notwithstanding the great cost thereby inflicted on society, the federalist system, and the principle of finality. Because of the pressing need to fill this critical void, this Court should grant certiorari to review the judgment below.

POINT TWO

Review of the decision below will enable this Court to clarify the import of its decision in *United States* v. *Henry*.

In *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court held that a defendant was denied the protection of the Sixth Amendment when the government introduced against him at trial statements which had been "deliberately elicited" from him by government agents in the absence of counsel. Subsequently, in *United States* v. *Henry*, 447 U.S. 264 (1980), this Court discussed the *Massiah* prin-

ciple in the context of a defendant's statement to a cellmate who was acting as an undisclosed informant for the government. Largely because of the scantiness of the record in *Henry*, however, the opinion in that case, which was accompanied by a concurring opinion and two dissenting opinions, has prompted as many questions as it has answered regarding the circumstances under which the government's use of an informant impermissibly infringes upon a defendant's Sixth Amendment rights. The resulting confusion not only impairs the ability of courts to apply a consistent and straightforward standard in adjudicating claims arising in such a context, but, perhaps more significantly, also frustrates the efforts of law enforcement officers who recognize informants as a vital and valuable weapon in the battle to detect and anticipate crime and who seek to utilize such informants without transgressing constitutional restrictions. In this regard, it must be remembered that the *Massiah* Court did "not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted." *Massiah*, 377 U.S. at 207.[2]

As Justice Brennan has observed with reference to the *Henry* decision, "[t]here has occasionally been disagreement as to the precise formulation of the relevant standard and its application to the sometimes-ambiguous facts in

2. The present case brings this comment directly to mind for here, in addition to instructing the informant to ask no questions, Detective Cullen indicated that he was specifically interested in learning the identities of Wilson's unapprehended accomplices. As the Second Circuit's first opinion in this case noted, "[t]he instructions to Lee suggest a conscious effort on Cullen's part to guard Wilson's constitutional rights, while pursuing a crucial homicide investigation." *Wilson* v. *Henderson*, 594 F.2d 1185, 1191 (2d Cir. 1978) (Appendix E, p. 42a).

cases before us." *Sweat* v. *Arkansas*, —— U.S. ——, —— 53 U.S.L.W. 3504, 3505 (January 14, 1985) (Brennan, J., dissenting). Indeed, the Ninth Circuit has complained that "[t]he extent to which *Henry* modified *Massiah*, if at all, is not entirely clear." *United States* v. *Bagley*, 641 F.2d 1235, 1238 n. 3 (9th Cir. 1981), *cert. denied*, 459 U.S. 942 (1982). Surely, the Second Circuit's decision in the present case, in which it found that *Henry* did not establish a "new" constitutional test, but, at the same time, that it invalidated the result that had been reached by a prior Second Circuit panel in reliance on *Massiah* (Appendix A, pp. 12a-16a), has done little to dispel the confusion. This Court should therefore grant a writ of certiorari in order to clarify the highly significant Sixth Amendment principles that were at issue in the judgment below.

The present case would enable this Court to provide such clarification because here, in contrast to *Henry*, the circumstances of the statement to the informant were fully developed at a pre-trial fact-finding hearing at which both the informant and the detective who instructed him testified and were subjected to cross-examination. In *Henry*, the only evidence elicited specifically in connection to a *Massiah* issue was an affidavit, filed years after the incriminating statement was made, containing the sketchy recollections of the instructing officer.[3] The inadequacy of the record in *Henry* was recognized by Justice Powell, who "view[ed] this as a close and difficult case because no evidentiary hearing has been held on the Massiah claim" *Henry*, 447

3. Henry did not challenge the constitutionality of his statement until 1975, nearly three years after it was made. Only after Henry's post-judgment motion pursuant to 28 U.S.C. § 2255 was denied, reversed on appeal, and then remanded did the District Court request affidavits. *Henry*, 447 U.S. at 268.

U.S. at 277 (Powell, J., concurring) and by Justice Blackmun, who noted that, because of the "scant record," "we know only that Nichols [the informant] and Henry had conversations . . . . We know nothing about the nature of these conversations." *Henry*, 447 U.S. at 287-88 (Blackmun, J., dissenting).

Because of the meager record to which it relates, *Henry's* holding is necessarily limited. Indeed, it can stand for little more than the proposition that, in the absence of evidence to the contrary, an inference of deliberate elicitation can be drawn from the existence of three factors: (1) that the cellmate was acting as a paid government informant; (2) that he was ostensibly no more than a fellow inmate; and (3) that the defendant was in custody and under indictment. *See Henry*, 447 U.S. at 271 ("This combination of circumstances supports the Court of Appeals' determination"). *Henry* thus leaves open the question whether such an inference is either negated or precluded by direct evidence that the defendant uttered the incriminating statements spontaneously or in response to impulses that were wholly independent of the government and its agents. That question is squarely presented by the present case, in which the pre-trial hearing testimony established that Wilson's inculpatory remarks were made after his own brother upset him by telling him of his family's anguish over Wilson's role in the murder of Sam Reiner, a family friend. Indeed, as District Judge Gagliardi recognized, the presumptively correct state court finding that Lee merely listened passively as Wilson unburdened his guilty conscience distinguishes this case from *Henry* and transports it into an area regarding which the *Henry* Court expressly reserved decision: "the situation where an informant is

placed in close proximity but makes no effort to stimulate conversations about the crime charged." *Henry*, 447 U.S. at 271 n. 9 (Appendix B, p. 28a).

Thus, by granting a writ of certiorari in this case, this Court will be able to address the situation that was explicitly not reached in *Henry* and to expound the weight and significance to be attributed to the circumstantial factors identified in *Henry*, when the bare bones reflected in those factors are fleshed out by direct evidence regarding the specific nature of the jailhouse conversations from which the defendant's incriminating statements emerged. In so doing, this Court may put an end to questions regarding the extent, if any, to which *Henry* modified *Massiah*. Concomitantly, this Court could resolve the question whether *Henry* established a "new" constitutional rule which should not be given retroactive effect in collateral proceedings. *Cf. Solem* v. *Stumes*, —— U.S. ——, 104 S.Ct. 1338 (1984) (Because *Edwards* v. *Arizona*, 451 U.S. 477 (1981), established a new constitutional rule, it should not be applied retroactively unless such application is warranted by the three criteria discussed in *Stovall* v. *Denno*, 388 U.S. 293 (1967)). Therefore, in view of the vital importance of the Sixth Amendment issues that would be elucidated by this Court's review, this Court should grant the petition for a writ of certiorari.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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March, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1054—August Term, 1983

(Argued April 5, 1984 Decided August 27, 1984)

Docket No. 83-2113

JOSEPH ALLAN WILSON,

Petitioner-Appellant,

—against—

HON. ROBERT J. HENDERSON,
Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

Before:

TIMBERS, VAN GRAAFEILAND and CARDAMONE,
Circuit Judges.

Appeal from a denial of an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Reversed and remanded.

IDA C. WURCZINGER, New York, New York (Philip S. Weber, New York, New York, of counsel), for *Petitioner-Appellant*.

JEREMY GUTMAN, Assistant District Attorney, Bronx, New York (Mario Merola, District Attorney, Steven R. Kartagener, Assistant District Attorney, Bronx, New York, of counsel) for *Respondent-Appellee*.

CARDAMONE, *Circuit Judge*:

This appeal is from an order that denied habeas corpus relief. Reversing that order and granting petitioner his habeas remedy emphasizes not that a court likes or thinks it wise to reverse a conviction, but rather that a conviction obtained by means that offend constitutional principles may not stand. Here the State's use of a jailhouse informant placed in petitioner's cell by prearrangement to elicit inculpatory information violated his Sixth Amendment right to counsel.

Petitioner Joseph Allan Wilson appeals from a decision of the United States District Court for the Southern District of New York (Gagliardi, J.) that denied his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Although appellant has been before us on a previous application, *Wilson v. Henderson*, 584 F.2d 1185 (2d Cir. 1978), *rehearing denied*, 590 F.2d 408 (2d Cir.), *cert. denied*, 442 U.S. 945 (1979), the circumstances of this case require some reiteration of the facts giving rise to his present application.

I

On July 4, 1970 three individuals committed an armed robbery of the Star Taxicab Garage during which the on duty dispatcher was shot and killed. Three employees identified Wilson as being present on the Star premises. Aware that the police were looking for him, Wilson voluntarily surrendered himself on July 8 and was promptly arrested. After receiving his *Miranda* warnings, he admitted to Detective Cullen that while looking for his brother on the day in question, he came upon the scene of the crime and witnessed the robbery. Wilson told the detective that he had not been personally involved and fled only because he was afraid of being blamed. Counsel was subsequently assigned him, and he was arraigned on July 9.

Sent to the Bronx House of Detention following his arraignment, Wilson was later moved to a cell that overlooked the Star garage. His cellmate, a prisoner named Benny Lee, had previously agreed to act as an informant. Detective Cullen had instructed Lee to listen "to see if [he] could find out" the identity of the other two perpetrators, but not to "question the man in any way." Immediately upon entering the cell Wilson expressed dismay over the view—"somebody's messing with me because this is the place I'm accused of robbing"—and began to talk to Lee about the robbery. He told Lee that he had seen the robbers commit the crime and picked up some of the money they dropped. Lee commented that Wilson had better come up with a more convincing story.

Wilson subsequently was visited by his brother and learned at that time how upset his family was over the killing. Wilson again became agitated and, when he next

spoke to Lee, changed his story. This time appellant admitted that he and his two cohorts had in fact executed the robbery according to plan over the holiday weekend when they knew there would be a lot of money in the garage, and that the victim was shot during the robbery. Lee later reported Wilson's inculpatory statement to Detective Cullen, and gave him pages of secret notations made during his conversations with Wilson.

Subsequently indicted and charged with murder and felonious possession of a weapon, appellant moved to suppress his statements to Lee. Following a *Huntley*[1] hearing, the state trial court found that Lee did not "interrogate" Wilson, but only listened and made notes. It therefore denied Wilson's motion, concluding that his statements were voluntary and unsolicited. At Wilson's state court trial, the proof of guilt was nearly overwhelming and appellant was convicted by a jury for both crimes. Appeals to New York's intermediate and highest court were unavailing.

After this journey through the New York state courts, Wilson filed a petition for a writ of habeas corpus in the United States District Court, claiming that the admission of Lee's statements violated his constitutional rights. Relying on *Massiah v. United States*, 377 U.S. 201 (1964), the district court rejected this claim, finding that the record did not show any formal interrogation by the undercover agent but only spontaneous statements by Wilson. As noted, we affirmed the district court and refused to grant a rehearing. Certiorari was denied in 1979.

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1 *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S. 2d 838, 204 N.E.2d 179 (1965).

A year later the Supreme Court handed down its decision in *United States v. Henry*, 447 U.S. 264 (1980) (*Henry*). In September 1981 appellant filed a motion in state court to vacate his conviction, arguing that the admission of his statements to Lee was unconstitutional in light of *Henry*. In denying the motion the state court distinguished *Henry* on the ground that in that case Henry's cellmate was a paid government agent. The state judge also concluded that *Henry* was not to be applied retroactively. In January 1982 the Appellate Division denied Wilson's application for leave to appeal.

Having exhausted his state court remedies, Wilson filed a second petition for a writ of habeas corpus in the district court, specifically alleging that his right to counsel had been violated under *Henry* and that *Henry* should be applied retroactively. The district court, relying in part on the record of the state court hearing, concluded that Wilson had not been interrogated and that his statements to Lee were spontaneous. On appeal, Wilson argues that the district court erred both in concluding that there was no "deliberate elicitation" of incriminating statements within the meaning of *Massiah* and *Henry*, and in deferring to the state court's findings on this issue. Wilson also maintains that *Henry* formulated a constitutional rule governing an accused's right to counsel and urges us to apply *Henry* retroactively. The State contends that the legal principles articulated in *Henry* are no different from those we applied on Wilson's first habeas appeal, and that the ends of justice would not be served by reconsidering the merits of Wilson's petition, even were *Henry* not distinguishable.

II

It is well settled that courts may give controlling weight to a denial of a prior application for habeas corpus *only* if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders v. United States*, 373 U.S. 1, 15 (1963); *United States ex rel. Schnitzler v. Follette*, 406 F.2d 319, 321 (2d Cir.), *cert. denied*, 395 U.S. 926 (1969).

The State urges that there must be an end to litigation on Wilson's claim. This argument will hardly halt the inexorable rising and falling of the legal tides. A look at the long and tortured history of *Henry* itself as it also slowly wended its way through the court system until its final resolution in the Supreme Court amply answers the State's argument. The doctrine of res judicata is generally inapplicable to habeas proceedings. *Smith v. Yeager*, 393 U.S. 122, 124-25 (1968) (per curiam); *Salinger v. Loisel*, 265 U.S. 224, 230 (1924). Moreover, we note that conventional notions of finality in criminal litigation are of no weight where life or liberty is at stake and infringement of constitutional rights is alleged. *Sanders v. United States*, *supra*, 373 U.S. at 8; *see Davis v. United States*, 417 U.S. 333, 342 (1974); *Kaufman v. United States*, 394 U.S. 217, 228 (1969). Thus, notwithstanding that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the "ends of justice" require a consideration of the merits of his present application.

III

We turn first to *United States v. Henry*, 447 U.S. 264. There the defendant was indicted in 1972 for armed robbery and held pending trial in a city jail. Government agents contacted Nichols, an inmate serving a sentence for forgery, who had previously served as a paid informant for the Federal Bureau of Investigation. Nichols advised the agents that he was housed in the same cellblock with several federal prisoners awaiting trial, including Henry. Nichols was told to be alert to any statements made by the prisoners, but not to initiate any conversation with or question Henry regarding the robbery. The informant later reported that he engaged in a conversation with Henry during which Henry told him about the robbery. Nichols was paid for this information. Henry's inculpatory statements were used against him at trial and led to his conviction, which was summarily affirmed, 483 F.2d 1401 (4th Cir. 1973), and his petition for certiorari was denied, 421 U.S. 915 (1975).

When Henry moved to vacate his conviction pursuant to 28 U.S.C. § 2255, he claimed that Nichols' testimony violated his Sixth Amendment right to counsel, inasmuch as a paid informant had been intentionally placed in his cell to secure information about the robbery. The district court summarily denied Henry's § 2255 motion, but the Court of Appeals for the Fourth Circuit reversed and remanded for an evidentiary hearing. The district court's second denial of the § 2255 motion was again reversed on appeal. The Fourth Circuit held that the government's actions impaired Henry's Sixth Amendment rights under *Massiah v. United States*, 377 U.S. 201 (1964). *Henry v. United States*, 590 F.2d 544 (4th Cir. 1978). After noting that Nichols had engaged in conversations with Henry,

the court of appeals concluded that if by association, general conversation, or both, Henry developed sufficient confidence in Nichols to bare his incriminating secrets, this constituted interference with his right to the assistance of counsel. 590 F.2d at 547.

On appeal the Supreme Court affirmed that decision. *United States v. Henry*, 447 U.S. 264. The issue was whether a government agent "deliberately elicited" incriminating statements from the defendant within the meaning of *Massiah*. *Id.* at 270. In considering that issue the Supreme Court viewed three factors as important: first, that Nichols was acting under instructions as a paid informant; second, that ostensibly he was no more than a fellow inmate of Henry; and third, that Henry was in custody and under indictment at the time he was engaged in conversation by Nichols. *Id.* The Court accepted the circuit court's determination that held Nichols' conduct attributable to the government, based in large part on the Government's awareness that Nichols had access to Henry and would be able to engage him in conversations without arousing his suspicions. In rejecting the government's argument that the agents had instructed Nichols not to question Henry about the robbery, the Supreme Court noted that Nichols was not a purely passive listener but had in fact engaged in some conversations with Henry which resulted in Henry's making the inculpatory statements. *Id.* at 271. In this connection the Court specifically stated that it was not passing upon a situation where an informant, although placed in close proximity to the accused, made no effort to stimulate conversations about the crime charged. *Id.* at 271 n.9. Thus, the high Court concluded that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government vio-

lated Henry's Sixth Amendment right to counsel." *Id.* at 274.

When comparing *Henry* to the present case, the district court recognized that Wilson's cellmate was surreptitiously acting as a government agent, but concluded that the record established that Wilson's statements were spontaneous and not elicited by Lee. Since the court thought that this case presented the precise fact pattern on which the *Henry* court had expressly reserved in footnote 9, the judge therefore found the instant case distinguishable. We disagree. A comparison of this case and *Henry* reveal three significant similarities: (1) as in *Henry*, here the informant Lee was surreptitiously acting as a government agent, while ostensibly no more than a fellow inmate of Wilson; (2) Wilson made the inculpatory statements after his Sixth Amendment rights had attached;[2] (3) in *Henry*, the government created a situation that in fact induced the defendant to make incriminating statements. The factors considered and given weight by the *Henry* Court are also present here. In both cases, the informant "had 'some conversations with' [the defendant] while he was in jail and [the defendant's] incriminatory statements were 'the product of [these] conversation[s].'" *Henry*, 447 U.S. at 271. This third factor deserves more detailed discussion.

Here, after Lee was summoned by Detective Cullen, he was shown a picture of Wilson. Lee asked whether he could do anything to help with the case. After agreeing to cooperate, Lee was told that Wilson was soon going to be

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2 It is of no moment that Henry had been indicted while Wilson had only been arraigned at the time he engaged in conversation with Lee since Wilson's Sixth Amendment right to counsel attached at the time adversary judicial proceedings were initiated against him. *See Estelle v. Smith*, 451 U.S. 454, 469-70 (1981); *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977).

arrested and placed in Lee's cell. He was directed to find out as much information from Wilson as he could without asking questions. The fact that the government moved Wilson into a cell overlooking the Star Taxicab Garage—the scene of the crime—achieved the desired effect. As soon as Wilson arrived and viewed the garage, he became upset and stated that "someone's messing with me." The catalytic effect of being placed into this "room with a view" thus gave rise to expressed uneasiness on Wilson's part. Even accepting that Lee did not ask Wilson any direct questions, he effectively deflated Wilson's exculpatory version of his connection to the robbery scene by remarking that the story did not "sound too good" and that he had better come up with a better one. Subtly and slowly, but surely, Lee's ongoing verbal intercourse with Wilson served to exacerbate Wilson's already troubled state of mind. Lee testified that after several days and nights together, Wilson's version of the events surrounding the robbery changed "in bits and pieces." During this same time, Lee furtively made notes of his conversations with Wilson, which he later handed over to the police.

Thus, upon comparison, the district court erred in holding that this case came within the *Henry* footnote. The instant case cannot be held to be equivalent to one where an informant merely sits back and makes no effort to stimulate conversations with the suspect about the crime charged. *Henry*, 447 U.S. at 271 n.9. In fact, we conclude that *Henry* is indistinguishable from the present case. *See Henry*, 447 U.S. at 281 (Blackmun, J., dissenting) (citing *Wilson*); *Henry v. United States*, 590 F.2d 544, 553 (4th Cir. 1978) (Russell, J., dissenting) ("Certainly, there can be no distinction drawn between this case and *Wilson*. In fact, if anything, the facts in that case

were more favorable to the defendant's claim than are the facts in this case."); *Wilson v. Henderson*, 590 F.2d 408, 409 (2d Cir. 1979) (Oakes, J., dissenting) (noting *Henry* decision in Fourth Circuit to be "directly contrary" to our case); *see also United States v. Sampol*, 636 F.2d 621, 637-38 (D.C. Cir. 1980) (noting allegations that the circumstances of *Wilson* and *Henry* were "virtually identical"). Since the government intentionally staged the scene that induced Wilson to make the inculpatory statements, it may be held to have deliberately elicited them in violation of Wilson's Sixth Amendment right to counsel.

IV

Judicial decisions ordinarily apply retroactively. *Robinson v. Neil*, 409 U.S. 505, 507-08 (1973). Before *Linkletter v. Walker*, 381 U.S. 618 (1965), the Supreme Court had recognized a general rule of retroactive effect for its constitutional decisions based largely upon Blackstone's notion "that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.' " *Id.* at 622-23 (quoting 1 W. Blackstone, Commentaries 69 (15th ed. 1809)). Consequently, a legal system based on precedent had a built-in presumption of retroactivity. Yet, in *Linkletter*, the Court refused to give that effect to *Mapp v. Ohio*, 367 U.S. 643 (1961). Instead, the Supreme Court applied its holding in *Mapp* only to those defendants whose convictions were not then final. It wrote that "the Constitution neither prohibits nor requires retrospective effect" be given to any "new" constitutional rule, *Linkletter v. Walker, supra*, 381 U.S. at 629, 628, and it recognized that the interests of justice and the exigencies of the situation may argue against imposing a "new" constitutional decision retroactively. *See id.* at 628.

On the other hand, when a Supreme Court decision does *not* espouse a "new" rule but simply applies settled precedents to new and different fact situations, no real question arises as to whether the later decision should apply retroactively. *United States v. Johnson*, 457 U.S. 537, 549 (1982). In these cases "it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *Id.* (citing *Dunaway v. New York*, 442 U.S. 200, 206 (1979) (reviewing application of the rule in *Brown v. Illinois*, 422 U.S. 590 (1975)); *Spinelli v. United States*, 393 U.S. 410, 412 (1969) ("further explicat[ing]" the principles of *Aguilar v. Texas*, 378 U.S. 108 (1964)); *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting)).

In determining whether *Henry* established a "new" rule of law or merely applied settled precedent to a new factual situation, we first take cognizance of the very words used by the *Henry* court in framing the issue for decision:

> The question here is whether under the facts of this case a Government agent "deliberately elicited" incriminating statements from Henry within the meaning of *Massiah*.

Henry, 447 U.S. at 270. Certainly the above quoted language does not purport to do anything more than apply the *Massiah* test for deliberate elicitation to the *Henry* facts. The *Henry* opinion reaffirmed the application of the "deliberately elicited" test by pointing out that when an accused is in the company of a fellow inmate who, by prearrangement, acts as a government agent, the conversations can serve to elicit information that an accused would not otherwise intentionally reveal

to persons *known* to be government agents. *See id.* at 273. In rejecting the government's argument that a less rigorous standard should apply where the accused is prompted by an undisclosed undercover informant rather than by a known government agent, the Court again pointed directly to *Massiah* which stated "that if the Sixth Amendment 'is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted [overtly] in the jailhouse.' " *Id.* at 273 (quoting *Massiah v. United States*, *supra*, 377 U.S. at 206). Both the *Henry* and the *Massiah* courts noted that defendants were more seriously imposed upon when they did *not* know that the informant was a government agent. *Henry*, 447 U.S. at 273; *Massiah v. United States*, *supra*, 377 U.S. at 206.

The *Henry* court continued stating that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Henry*, 447 U.S. at 274 (footnote omitted). While the import of this statement has been questioned, *see, e.g., United States v. Bagley*, 641 F.2d 1235, 1238 n.3 (9th Cir. 1981) ("The extent to which *Henry* has modified *Massiah*, if at all, is not entirely clear"), we believe that *Henry* merely applied the "deliberately elicited" test of *Massiah* to new facts, and we reject a reading of *Henry* as establishing a "likely to induce" test that fundamentally restructures *Massiah*.[3]

Further support for the conclusion that *Henry* did not establish a "new" constitutional rule is found from the

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[3] Having so concluded, we need not address the *Linkletter/Stovall* factors governing the retroactive application of a "new" constitutional decision. *See Linkletter v. Walker*, 381 U.S. 618, 636 (1965) and *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

fact that there has been no explanatory statement by the Supreme Court whether and to what extent such a purported new rule applies to past, pending and future cases. *See, e.g., Solem v. Stumes*, 104 S. Ct. 1338 (1984) (holding that *Edwards v. Arizona*, 451 U.S. 477 (1981) should not be applied retroactively); *United States v. Johnson, supra*, 457 U.S. at 542 (holding that *Payton v. New York*, 445 U.S. 573 (1980), applied retroactively to all convictions not yet final); *Williams v. United States*, 401 U.S. 646 (1971) (holding *Chimel v. California*, 395 U.S. 752 (1969) not to be retroactive); *Desist v. United States*, 394 U.S. 244, 248 (1969) ("However clearly our holding in *Katz* [*v. United States*, 389 U.S. 347 (1967)] may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future."). *See generally* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975). More specifically, for our purposes, the habeas petitioner was granted relief in *Henry* without reference to the three part test of *Stovall v. Denno*, 388 U.S. 293, 297 (1967). Since the *Stovall* analysis is employed as a matter of course to determine whether a new rule should be retroactive, the failure to discuss the *Stovall* test indicates that the Supreme Court in *Henry* did not intend to create a "new" rule, but was merely applying the *Massiah* rule to new facts.

Having decided that the principles of *Henry* are fully applicable to the instant case, we hasten to point out that the courts considering this matter earlier did not have the benefit of the *Henry* decision as we now do. Without it, the prior panel relying on *Brewer v. Williams*, 430 U.S. 387 (1977), concluded that the "deliberate elicitation" standard required evidence of "interrogation" as a pre-

requisite. Since the state trial judge found that there had been no "interrogation" of Wilson by his cellmate, the panel concluded that this negated the proposition that Wilson's statements were "deliberately elicit[ed]." *Wilson v. Henderson, supra*, 584 F.2d at 1190-91; *but see id.* at 1195 (Oakes, J. dissenting) (in finding a *Massiah* violation, "what is critical is whether police conduct 'deliberately elicited' information, not the precise manner in which the statements were obtained."). In *Henry* the Supreme Court rejected such a proposition, writing that *Brewer* never modified *Massiah's* "deliberately elicited" test. It specifically noted that "[i]n *Massiah*, no inquiry was made as to whether Massiah or his codefendant first raised the subject of the crime under investigation," *Henry*, 447 U.S. at 271-72, and went on to state that "[i]n both *Massiah* and this case, the informant was charged with the task of obtaining information from an accused." *id.* at 272 n.10. It concluded by observing that "[w]hether Massiah's codefendant questioned Massiah about the crime or merely engaged in general conversation about it was a matter of no concern to the *Massiah* Court," and deemed "irrelevant" the fact that in *Massiah* the agent had to arrange the meeting while in *Henry* the agents were fortunate to have an undercover informant already in close proximity to the defendant. *Id.*

The earlier panel also found no distinction between incriminating statements voluntarily made by a defendant to a known government officer and statements made to an undercover agent acting surreptitiously, likening the latter situation to a knowing assumption of the risk by the defendant that his confidant would ultimately prove untrustworthy. *Wilson v. Henderson, supra*, 584 F.2d at 1191. Looking again to *Massiah*, *Henry* substantially distinguished these two situations. Where an accused

speaks to a known government agent, he would typically be aware that his statements could be used against him, and as a result, the two parties could be termed " 'arm's-length' adversaries." *Henry*, 447 U.S. at 273. The same could not be said where the accused was in the company of a fellow inmate who quite unknown to the accused was acting as a police agent. In that situation, where the accused's guard was down, he might well confide in the informer who was subtly interrogating him. In that case, the concept of a knowing and voluntary waiver of Sixth Amendment rights is inapplicable. *Id.* (citing *Massiah v. United States*, *supra*, 377 U.S. at 206).

V

The State's use of a jailhouse informant to elicit inculpatory information from Wilson controvened his right to counsel under circumstances similar to those condemned in *Henry* and *Massiah*. Accordingly, the decision of the district court denying Wilson's application for habeas relief is reversed, and this case is remanded with instructions to grant Wilson's application and to direct his release unless the State elects to retry him.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

On July 4, 1970, at approximately 3:30 a.m., two witnesses saw appellant leave the Star Maintenance Cab garage in the Bronx with a quantity of money cradled in his arms. "Keep cool", appellant said as he fled the garage, "I've left something on the floor for you."

That "something" was the body of Samuel Reiner, the night dispatcher, who had been shot and killed during the course of a robbery.

In what could only be termed an understatement, my colleagues say that proof of appellant's guilt was "nearly overwhelming." The fact is that the police had appellant dead to rights. Although appellant neither confessed nor testified, he admitted to the police that he was at the scene of the crime with two other men and that he ran away with them as they fled the scene with money in their hands.

What the police did not know but wanted to learn was the identity of the other two participants in the crime. It is undisputed that Detective Cullen enlisted the aid of Benny Lee for this sole purpose. Detective Cullen told Lee that he knew appellant was one of the perpetrators. According to Lee, Cullen "didn't want me to ask questions or question the man in any way, just to sit there and to listen to him and to see if I could find out the names of the other two men who were involved." Despite this evidence which is uncontradicted, my colleagues now find that Lee was placed in appellant's cell "to elicit inculpatory information", that Lee was "subtly interrogating" appellant, and that the government "deliberately elicited the inculpatory statements" which appellant made. As in *Sumner v. Mata*, 449 U.S. 539, 548-49 (1981), these findings are contrary to those of every court that heretofore has considered this case.

Following a *Huntley* hearing, the State court found that Lee followed the instructions given him by Detective Cullen and conducted no interrogation of appellant during the time they were cellmates. The court also found "beyond a reasonable doubt that the utterances made by defendant to Lee were unsolicited, and voluntarily

made." Appellant's challenge to these findings was rejected without opinion by the Appellate Division, First Department. 41 A.D.2d 903 (1st Dep't 1973).

In denying appellant's first petition for habeas corpus, District Judge Robert Carter stated:

> The record indicates that there was no interrogation whatsoever by the undercover agent only spontaneous statements offered by petitioner.

District Judge William Mehrtens, sitting by designation on this Court and writing the majority opinion for affirmance, 584 F.2d 1185 (1978), stated that

> Lee did not make any effort to interrogate Wilson, nor was he placed in the cell for that purpose. . . .
>
> Thus, the purpose of the investigation, *i.e.*, furtively attempting to uncover the identity of the other two perpetrators, cannot be censured.

Id. at 1191.

Finally, District Judge Lee Gagliardi, whose decision is being reversed, found that the "record plainly establishes that petitioner's incriminating statements were spontaneous and were not elicited in any way by the government informant." Judge Gagliardi also found that the State court findings were "fully supported by the record."

Although in reviewing Judge Gagliardi's findings this Court is not bound by the clearly erroneous standard of review, *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980), the burden nonetheless remains on appellant to establish by convincing evidence that the State court's factual determinations following the *Huntley* hearing were erroneous, *United States ex rel Stambridge v. Zelker*, 514 F.2d 45, 51 (2d

Cir.), *cert. denied*, 423 U.S. 872 (1975). We cannot dispense with the presumption that the State court's factual findings are correct, 28 U.S.C. § 2254(d), without an adequate explanation as to why the findings are not fairly supported by the record. *Sumner v. Mata*, *supra*, 449 U.S. at 548-52.

Because this Court, in affirming the rejection of appellant's prior habeas corpus application in which he advanced the same arguments that he asserts herein, made findings fully in accord with those of the State court, the need for such an explanation is even more imperative. A boilerplate statement that the "ends of justice" justify reconsideration on the merits, *see Sanders v. United States*, 373 U.S. 1, 12 (1963), does not warrant rejection of all that has gone on before. *See Sperling v. United States*, 692 F.2d 223, 225-26 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 311 (1983); *Alessi v. United States*, 653 F.2d 66, 68-69 (2d Cir. 1981). My colleagues concede that proof of appellant's guilt was "nearly overwhelming", and they point to no change in the law which has transformed conduct that we formerly held to be constitutional into conduct that is now unconstitutional. *See Sperling v. United States*, *supra*, 692 F.2d at 226. The judges who voted against en banc review of our prior order of affirmance, 590 F.2d 408, were fully familiar with the Fourth Circuit's opinion in *Henry v. United States*, 590 F.2d 544 (4th Cir. 1978), which subsequently was affirmed by the Supreme Court, 447 U.S. 264 (1980). The majority opinion does not disclose why, absent a change in the law, the "ends of justice" require reversal on this appeal when they did not require it on the prior appeal.

In short, because my colleagues have failed to demonstrate that the many judges who previously have rejected

appellant's contentions erred in so doing, and have relied solely on a talismanic reference to the "ends of justice" in getting around both the provisions of section 2254(d) and the limitations on repetitive habeas corpus applications laid down in *Sperling v. United States*, *supra*, and *Alessi v. United States*, *supra*, I dissent.

APPENDIX B

—CORRECTED—

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of December one thousand nine hundred and eighty-four.

No. 83-2113

JOSEPH ALLAN WILSON,

Plaintiff-Appellant,

v.

HON. ROBERT J. HENDERSON,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee, Hon. Robert J. Henderson,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX C

Memorandum Decision

UNITED STATES DISTRICT COURT

Southern District of New York

82 Civ. 4397

Joseph Allan Wilson,

Petitioner,

against

Hon. Robert J. Henderson, Superintendent, Auburn Correctional Facility,

Respondent.

Gagliardi, D.J.

Joseph Allan Wilson, currently incarcerated in the Auburn Correctional Facility, has petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the alternative, petitioner seeks an order pursuant to Rule 60(b)(6), Fed. R. Civ. P., vacating an order of Judge Carter of this court which denied a prior petition for a writ of habeas corpus filed by petitioner.

Petitioner was convicted of murder in the second degree and possession of a weapon as a felony after a jury trial in New York Supreme Court, Bronx County, and on May 18, 1972, was sentenced to an indeterminate term of twenty

years to life on the murder count and to a concurrent indeterminate term not to exceed seven years on the weapons conviction. The convictions were affirmed without opinion by the Appellate Division, First Department, on April 19, 1973, and leave to appeal to the Court of Appeals was subsequently denied. Petitioner then filed a petition for a writ of habeas corpus before Judge Carter which was denied by opinion and order dated January 7, 1977. Judge Carter's decision was affirmed on appeal, *Wilson* v. *Henderson*, 584 F.2d 1185 (2d Cir. 1978), and petitioner's application for a rehearing en banc was denied, 590 F.2d 408 (2d Cir. 1979). The Supreme Court denied certiorari on June 18, 1979. 442 U.S. 945 (1979). Petitioner now attacks the judgment of conviction on the ground that the trial court's admission into evidence of certain post-arraignment statements by petitioner violated his Sixth Amendment right to counsel under the Supreme Court's decision in *United States* v. *Henry*, 447 U.S. 264 (1980).[1] In adjudicating petitioner's prior habeas petition before *Henry* was decided, the Second Circuit squarely rejected petitioner's Sixth Amendment claim. *Wilson, supra*, 584 F.2d at 1189-91. Petitioner now asserts that the Second Circuit's decision is inconsistent with *Henry*, and that *Henry* should be applied retroactively to this case.

1. Petitioner advanced this argument to the State Supreme Court in a motion to vacate the judgment filed on September 11, 1981 pursuant to N.Y. Crim. Proc. Law § 440.10. The motion was denied by order dated November 20, 1981, and leave to appeal to the Appellate Division was denied on January 19, 1982. Petitioner therefore exhausted his state court remedies with regard to his current claim as required by 28 U.S.C. § 2254(b). *See Klein* v. *Harris*, 667 F.2d 274, 282-84 (2d Cir. 1981).

Background

On July 14, 1970, three individuals robbed the Star Taxicab Garage and in the course of that robbery shot to death Sam Reiner, the dispatcher then on duty. Three Star employees identified petitioner as having been on the premises before the crime. Four days later, petitioner voluntarily surrendered to the authorities and was promptly arrested. After receiving *Miranda* warnings, petitioner told Detective Cullen of the New York City Police Department that he had been at the scene while looking for his brother and had witnessed the crime, but that he had not been personally involved. Petitioner told Cullen that he fled the scene because he was afraid of being blamed for the crime.

Wilson was sent to the Bronx House of Detention following his arrest. After four days, he was moved to a cell which overlooked the Star Taxicab Garage. His cellmate was a prisoner named Benny Lee who had previously agreed to act as an informant for the police. Detective Cullen had instructed Lee not to make inquiries or to question petitioner in any way, but simply to listen for information regarding the identity of the other perpetrators of the crime.

On the day that he was moved into the cell with Lee, petitioner became upset by the view of the Star Taxicab Garage from the cell window and began speaking to Lee about the robbery and murder. At that time, petitioner told Lee essentially the same story he had told Detective Cullen. Lee responded that the story "didn't sound too good."

Two or three days later, petitioner was visited by his brother, who told him that his family was saying that he had killed Sam Reiner. Petitioner became very upset by

this visit and began once again to talk about the crime. This time he told Lee that he had planned and executed the robbery and murder along with two other men.

Petitioner was subsequently indicted and charged with common law murder and possession of a weapon as a felony. He moved prior to trial to suppress his statements to Lee. The motion was denied by the state trial judge following a hearing held pursuant to *People* v. *Huntley,* 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), and the statements were admitted into evidence at trial.

Discussion

There are two issues raised by the instant petition: (1) whether the Second Circuit's prior decision rejecting petitioner's Sixth Amendment claim is inconsistent with *United States* v. *Henry,* 447 U.S. 264 (1980); and (2) whether *Henry* should be applied retroactively. The court first turns to the merits of the Sixth Amendment claim in light of the Supreme Court't analysis in *Henry.*

The defendant in *Henry* was indicted for armed robbery and was held pending trial in the local city jail. Agents investigating the robbery thereafter contacted an inmate at the jail named Nichols who was housed in the same cell block as Henry and who had previously worked as a paid government informant. Nichols was instructed neither to question Henry nor to initiate conversations with him about the robbery, but simply to pay attention to information furnished by Henry if Henry initiated a conversation. Henry subsequently made inculpatory statements in conversations with Nichols which were used against Henry at trial.

The Supreme Court reversed the conviction, holding that the admission of the statements violated the defendant's Sixth Amendment right to counsel. The Court stated that the issue in the case was whether the inculpatory statements had been "deliberately elicted" by the government within the meaning of the Court's prior decision in *Massiah* v. *United States,* 377 U.S. 201, 206 (1964).[2] Among the relevant factors relied upon by the Court was an inference drawn from the record that Nichols "deliberately used his position to secure incriminatory information from Henry," and that the government must have known that the circumstances it had created "likely would lead to that result." *Id.* at 270-71. These facts led the Court to conclude that the government had intentionally created a situation that was "likely to induce Henry to make incriminating statements without the assistance of counsel" in violation of the Sixth Amendment. *Id.* at 274.

The court finds that *Henry* does not undermine the prior decision of the Second Circuit which rejected petitioner's Sixth Amendment claim.[3] It is true that here, as in *Henry,* the cellmate of the accused was surreptitiously acting as a government agent and that petitioner made the incriminating statements after his Sixth Amendment rights had attached.[4] However, unlike the record in *Henry,* the record in the instant case does not support the inference that the

2. In *Massiah,* the defendant, after having been indicted and released on bail, made incriminating statements to a codefendant who was acting as a government agent. The Court held that the use at trial of such statements, "which federal agents had deliberately elicited from [the defendant] after he had been indicted and in the absence of counsel" violated the Sixth Amendment. 377 U.S. at 206.

3. In light of this conclusion, the court need not and does not reach the issue of whether *Henry* should be retroactively applicable.

4. The Sixth Amendment right to counsel attaches at the time that adversary judicial proceedings are initiated against the accused. *Estelle* v. *Smith,* 451 U.S. 454, 469-70 (1981). Although petitioner's statements were made prior to his indictment, they were made after he was arraigned and therefore after his Sixth Amendment right to counsel had attached. *Id.*

government informant affirmatively secured the incriminating information from the accused. In fact, the instant record plainly establishes that petitioner's incriminating statements were spontaneous and were not elicited in any way by the government informant. The testimony at the *Huntley* hearing established that petitioner's initial false exculpatory statements to Lee were a spontaneous response to petitioner's view of the Star Taxicab Garage from his cell window, and that petitioner's ultimate confession to Lee was a spontaneous response to a disturbing visit petitioner received from his brother. This testimony led the state trial judge to find, in denying petitioner's motion to suppress, that Lee at no time asked petitioner any questions with respect to the crime, and that all of petitioner's statements in Lee's presence were "spontaneous." These state court findings, which are fully supported by the record, must be presumed to be correct by this court under 28 U.S.C. § 2254(d).

The absence of any affirmative effort on the part of Lee to elicit information from petitioner is fatal to petitioner's Sixth Amendment claim under *Henry*. The *Henry* Court expressly reserved decision on the situation squarely presented by this case, *i.e.*, "where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged." *Henry*, 447 U.S. at 271 n.9. Of course, a claim squarely rejected in a prior Second Circuit decision cannot be reassessed by this Court on the basis of a subsequent Supreme Court case which explicitly failed to reach the issue now presented.

Furthermore, the court agrees with Justice Powell that:

> *Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. *See United States* v. *Hearst*, 563 F.2d 1331, 1347-1348 (CA9 1977), *cert. denied*, 435 U.S. 1000 (1978). Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and "surreptitious interrogatio[n]" of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

Henry, supra, 447 U.S. at 276 (Powell, J., concurring). Since the record plainly establishes that Lee's actions did not constitute surreptitious interrogation of petitioner, the admission into evidence of petitioner's incriminating statements did not abridge his Sixth Amendment right to counsel.[5]

Conclusion

For the reasons set forth above, the petition is dismissed. The motion to vacate the prior order denying petitioner's original habeas petition is denied.

So Ordered.

/s/ Lee P. Gagliardi
U.S.D.J.

Dated: New York, New York
March 30, 1983.

5. In support of his claim under *Henry*, petitioner relies in part on the placement of petitioner in the cell overlooking the scene of the crime, claiming that this action deliberately elicited his statements in violation of the Sixth Amendment. Although the record indicates that petitioner's placement in the cell motivated his initial exculpatory statements to Lee, there is no doubt that the location of the cell, without more, was not "likely to induce [petitioner] to make incriminating statements" in violation of the Sixth Amendment. *Henry, supra* 447 U.S. at 277.

APPENDIX D

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 5186

UNITED STATES OF AMERICA ex rel. JOSEPH ALLEN WILSON,
Plaintiff,

against

HON. ROBERT J. HENERSON, Superintendent,
Auburn Correctional Facility,
Defendant.

APPEARANCES:

Joseph Allen Wilson, Pro Se, 135 State Street, Auburn, New York 13022.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Two Trade Center, New York, New York 10047.

by: Arlene R. Silverman, Assistant Attorney General
Attorneys for Defendant.

OPINION

CARTER, District Judge

Petitioner, Joseph Allen Wilson, an inmate at Auburn Correctional Facility, seeks a writ of habeas corpus. On April 20, 1972, petitioner was convicted in a jury trial in

New York State Supreme Court of murder and possession of a weapon. On May 18, 1972, petitioner was sentenced to a prison term of twenty years to life on the murder conviction, and to a concurrent term, not to exceed seven years, on the weapons conviction.

Petitioner has exhausted his state remedies. On April 23, 1973, the Appellate Division affirmed Wilson's conviction. Leave to appeal to the New York Court of Appeals was denied.

Facts

Joseph Allen Wilson planned the robbery of the Star Taxicab Garage. As a former employee, he knew its layout and was familiar with its business operations. In the early morning hours of July 4, 1970, Wilson was joined by two companions to execute his robbery plan. The three proceeded to the dispatcher's office where Sam Reiner was on duty. Apparently, Reiner refused to cooperate and was shot twice. He died instantly; and the three escaped.

Four days later, Wilson turned himself in to the authorities. When advised of his rights by Detective Walter Cullen, Wilson said he understood. He was asked if he wanted to make a statement and he replied, "No." He was then asked if he wanted to explain what he was doing on July 4th. Wilson replied, "Yes", and revealed to Detective Cullen that he had been at the scene and had witnessed the crime, although he insisted he was not personally involved.

Wilson was placed in a cell with Benny Lee who had earlier agreed with the police to act as an informant. Lee was instructed not to inquire or question Wilson, but to keep his ears open.[1] While Wilson initially kept to the

1. After the *Huntley* hearing, the court determined that Lee "so acted and, accordingly, no interrogation was conducted by Lee of the defendant at the time they were cellmates." (Tr. 142)

story he told Detective Cullen, he finally confessed to Lee that he had planned the robbery with the other two hold-up men and that the three of them perpetrated the crime. Wilson was subsequently indicted by the grand jury and charged with common law murder and possession of a weapon as a felony. At trial, both the statements made to Lee and those made to Cullen were admitted into evidence.

Petitioner makes here the following claims: (1) he was deprived of a speedy trial; (2) he was denied his right against self-incrimination when the arresting officer questioned him in custody; (3) the assignment of an undercover agent as his cellmate violated petitioner's constitutional rights; and (4) denial by the New York State Supreme Court of his discovery motion made it impossible for him to prepare his defense adequately.

For reasons stated below, petitioner's request for a writ of habeas corpus is denied.

* * *

Assignment of Undercover Agent as Petitioner's Cellmate

Petitioner asserts that the assignment of an undercover agent as his cellmate violated his constitutional rights.

The Supreme Court has held that the Sixth Amendment guarantees the aid of counsel during police interrogations in extra-judicial proceedings, *Massiah* v. *United States, supra,* 377 U.S. at 204; *Spano* v. *New York, supra,* 360 U.S. at 326 (Douglas, J. concurring). This right attaches "after the onset of formal prosecutorial proceedings," *Kirby* v. *Illinois,* 406 U.S. 682, 690 (1972). The record indicates that there was no interrogation whatsoever by the undercover agent only spontaneous statements offered by petitioner.[2]

2. See footnote 1, *supra.*

This fact precludes any Sixth Amendment violation. Since *Miranda* warnings need be given only when there is police custodial interrogation, *see United States* v. *Mattson,* 469 F.2d 1234, 1237 (9th Cir. 1972), *cert. denied,* 410 U.S. 986 (1973); *United States* v. *Godfrey,* 409 F.2d 1338, 1339 (10th Cir. 1969); and *Parson* v. *United States,* 387 F.2d 944, 945-46, this fact also precludes any Fifth Amendment violation.

Whatever claim petitioner might have that the use of the government agent violated his right to be protected against illegal searches and seizures, it is clear he had no expectation of privacy in the information divulged to the agent. The Supreme Court has stated that:

> "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."

Hoffa v. *United States, supra,* 385 U.S. at 302.

Finally, it cannot be concluded that due process was violated in this case. In *Hoffa* v. *United States, supra,* 385 U.S. at 311, the Court rejected such a claim when it stated that "the use of secret informers is not *per se* unconstitutional."

* * *

Petition denied.

IT IS SO ORDERED.

Dated: New York, New York
January 7, 1977

/s/ ROBERT L. CARTER

ROBERT L. CARTER
U.S.D.J.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 832—September Term, 1977.

(Argued May 23, 1978 Decided September 20, 1978.)

Docket No. 78-2015

JOSEPH ALLEN WILSON,

Petitioner-Appellant,

—against—

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

Before:

OAKES, *Circuit Judge,*

BLUMENFELD* and MEHRTENS,** *District Judges.*

Appeal from denial of petition for writ of habeas corpus attacking judgment of conviction on charges of murder and possession of weapon.

* Hon. M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut, sitting by designation.

** Hon. William O. Mehrtens, Senior United States District Judge for the Southern District of Florida, sitting by designation.

Affirmed.

JEFFREY IRA ZUCKERMAN, New York, N.Y., *for Petitioner-Appellant.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York and SAMUEL A. HIRSHOWITZ, First Assistant Attorney General, New York, N.Y. (Arlene R. Silverman, Assistant Attorney General, on the brief), *for Respondent-Appellee.*

MEHRTENS, *District Judge*:

In the early morning of July 4, 1970, three assailants robbed the Star Taxicab Garage and murdered the dispatcher on duty. Three Star employees identified the petitioner, Joseph Allen Wilson, as having been on the premises before the crime. Two testified that they had seen Wilson, a former employee, running from the scene after the incident, cradling money in his arms.

Four days later Wilson voluntarily surrendered himself to the authorities. He was promptly arrested and advised of his constitutional rights by Detective Walter Cullen. Wilson acknowledge seriatim that he understood each of his rights. At the conclusion of the recitation of rights, Cullen asked Wilson if, understanding all of his rights, he wished to make a "statement." Wilson replied, "No." The officer then queried, "Well, would you care to tell me what you did on July 4th?" Wilson responded affirmatively and revealed to Detective Cullen that he had been at the scene and had witnessed the crime, but insisted that he had not been personally involved. Wilson claimed to have fled the premises for fear of being blamed.

Wilson concluded his narrative with the words, "And that's all." Cullen asked Wilson if he would care to tell

him where he was between July 4th and the 8th. Wilson emphatically replied, "No, that's all I have to say." At that point the questioning ceased, and Wilson was removed to a detention cell. Counsel was subsequently assigned to represent him.

Wilson's cellmate, Benny Lee, had previously agreed to act as an informant for Detective Cullen. Lee was specifically instructed not to inquire or question, but to keep his ears open for information which could lead to the apprehension of Wilson's accomplices.

Initially, Wilson repeated to Lee the same version of the facts that he had related to Cullen. Lee's only comment was that the story did not sound too good. By the end of the third day, Wilson made an auricular confession to complicity in the robbery and murder.

Wilson was indicted and charged with common law murder and possession of a weapon as a felony. Prior to trial, Wilson moved to suppress his statements to Cullen and Lee. In accordance with *People* v. *Huntley,* 15 N.Y. 2d 72, 204 N.E. 2d 179, 255 N.Y.S. 2d 838 (1965), the state trial judge held a pre-trial hearing on the issue of the admissibility of the inculpatory statements made by Wilson. The court ruled adversely to Wilson, and the statements were admitted at trial. The jury returned a verdict of guilty on both counts, and Wilson was sentenced to a term of from twenty years to life on the murder conviction and to a concurrent term not to exceed seven years on the weapons count. The conviction was affirmed by the state appellate court and leave to appeal to the New York Court of Appeals was denied.

The instant appeal is taken from the district court's order denying Wilson's petition for a writ of habeas corpus.

Wilson cites as error the admission at trial of his statements to Cullen and Lee, and also challenges his conviction on the grounds that he was denied a speedy trial and that the denial of his discovery motion made it impossible for him to adequately prepare his defense.

* * *

II

Wilson's next assertion is that his incriminating statement made to his cellmate, Benny Lee, was improperly admitted at trial in violation of his Sixth Amendment right to counsel under *Massiah* v. *United States,* 377 U.S. 201 (1964).

The petitioner in *Massiah,* following his indictment for violation of federal narcotics laws, retained a lawyer, pleaded not guilty and was released on bail. A federal agent succeeded by surreptitious means in listening to incriminating statements elicited from the petitioner while he was free on bail. The statements were introduced against the petitioner at trial, and he was convicted. The Supreme Court reversed, holding that

> the petitioner was denied the basic protections of [the right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel.
>
> 377 U.S. at 206.

In the aftermath of *Massiah* some doubt remained as to whether all post-indictment statements made without the presence of counsel would be inadmissible, or whether such statements would be tainted only when police made a de-

liberate, pre-meditated effort to elicit incriminating remarks from a defendant. The Third Circuit, relying on the Supreme Court's per curiam reversal of *State* v. *McLeod,* 381 U.S. 356 (1965), concluded that *Massiah* rendered inadmissible all post-indictment statements obtained without counsel regardless of the circumstances. *United States ex. rel. O'Connor* v. *New Jersey,* 405 F.2d 632 (3rd Cir. 1969) cert. denied, *Yeager* v. *O'Connor,* 395 U.S. 923 (1969).

This circuit, however, has plainly adopted the majority view which requires that there be some circumstance more than the mere absence of counsel before a defendant's post-indictment statement is rendered inadmissible. In *United States* v. *Garcia,* 377 F. 2d 321 (2nd Cir. 1967) cert. denied 389 U.S. 991 (1967), this court refused to extend Sixth Amendment protection to a voluntary, incriminating statement made by the defendant to a federal officer where the officer was completely unaware of the existence of an indictment and was not seeking information about the crime charged in the indictment. In affirming the conviction this court said:

> Massiah was thus not aimed at all post-indictment evidence gathered by the prosecution, but at the narrow situation where, after indictment, law enforcement authorities have "deliberately elicited" incriminating statements from a defendant by direct interrogation or by surreptitious means. The rule does not apply to spontaneous or voluntary statements made by the defendant in the presence of a government agent.
>
> 377 F. 2d at 324 (footnote deleted).

The recent Supreme Court case of *Brewer* v. *Williams, supra,* strengthened this circuit's restrictive interpretation of *Massiah.* In *Brewer,* the Court stated that "no such

constitutional protection [of the right to assistance of counsel at the time the defendant made the incriminatory statements] would have come into play if there had been no interrogation." 430 U.S. at 400.

The trial judge in the instant case found that there had been no interrogation whatsoever by the undercover cellmate.[1] Detective Cullen testified that Lee had been specifically directed to refrain from questioning Wilson; Lee confirmed those instructions in his testimony. The complete absence of interrogation in this case negates the proposition that Wilson's statement was deliberately elicited. According to *Brewer,* constitutional protection would not attach under these circumstances.

Absence of interrogation was also an issue in *United States* v. *Hearst,* 563 F. 2d 1331 (9th Cir. 1977) cert. denied 46 U.S.L.W. 3659 (1978), where the court rejected the argument that interrogation is not required by *Massiah.* Hearst argued that intentional, secret listening would suffice as the prohibited "deliberate elicitation" of incriminating statements. Hearst's conviction was affirmed despite her contention that the surreptitious tape recording in her cell of her self incriminating conversation with a friend violated her Sixth Amendment right to counsel. Similarly, the court in *United States* v. *Fioravanti,* 412 F. 2d 407 (3rd Cir. 1969) cert. denied 396 U.S. 837 (1969), commented that there was no violation of the Sixth Amendment where the defendant freely volunteered an incriminating statement to an undercover agent who had been deliberately arrested along with the defendant. 412 F. 2d 413 at n. 15.

The instant case, therefore, is significantly different from *Brewer,* where the Court found that the police ques-

1. This factual finding is entitled to a presumption of correctness under 28 U.S.C. § 2254.

tioned the defendant with specific intent to elicit incriminating statements. The police in *Brewer* promised counsel that the defendant would not be interrogated during his transportation to another city. The defendant, accused of murdering a young girl, was known to one officer to be a deeply religious, former mental patient. The officer sought to obtain incriminating remarks from the defendant by stating that he felt they should stop and locate the body so that the little girl might have a Christian burial. The defendant eventually made several incriminating statements and directed the police to the girl's body. The Supreme Court held that the "Christian burial" speech was tantamount to interrogation and that under *Massiah* the defendant was entitled to the assistance of counsel at the time he made the incriminating statement. The Court stated that there could be no doubt that the officer deliberately and designedly set out to elicit incriminating information.

In contrast, Lee did not make any effort to interrogate Wilson, nor was he placed in the cell for that purpose. Both Lee and Cullen testified that Lee's job was to listen for the identity of Wilson's confederates. In *Massiah,* the Supreme Court stated:

> We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of a defendant and his alleged confederates, even though the defendant had already been indicted.
>
> 377 U.S. at 207.

Thus, the purpose of the investigation, *i.e.,* furtively attempting to uncover the identity of the other two perpetrators, cannot be censured. Further, where Lee did not

interrogate Wilson, nor in any way attempt to deliberately elicit incriminating remarks, the rule of *Massiah* has not been transgressed.

Nor is the fact that the informant was placed in Wilson's cell under surreptitious circumstances a distinguishing point in this case. This court has repeatedly held that a defendant's voluntary, incriminating statements made to a person known by the defendant to be a government officer are properly admissible under *Massiah. United States* v. *Garcia, supra; United States* v. *Gaynor,* 472 F. 2d 899 (2nd Cir. 1973); *United States* v. *Barone,* 467 F. 2d 247 (2nd Cir. 1972); *United States* v. *Maxwell,* 383 F. 2d 437 (2nd Cir. 1972) cert. denied 389 U.S. 1043 (1968); *United States* v. *Accardi,* 342 F. 2d 697 (2nd Cir. 1965) cert. denied 382 U.S. 954 (1965). Ostensibly, comparable statements made to undercover agents should receive similar treatment because the fact that an incriminating statement is received surreptitiously or otherwise is constitutionally irrelevant. *Brewer* v. *Williams,* 430 U.S. at 400. Furthermore, the admission of an in-custody statement voluntarily made to an informant seems less egregious than the use of a statement intercepted by an electronic eavesdropping device as was upheld in *United States* v. *Hearst, supra.* When a defendant makes a completely unsolicited, incriminating remark in a face-to-face encounter with an informant, he knowingly assumes the risk that his confidant may ultimately prove to be untrustworthy. In an illegal search and seizure case the Supreme Court stated:

> [n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to

whom he voluntarily confides his wrongdoing will not reveal it.

Hoffa v. *United States,* 385 U.S. 293, 302 (1966)

Nor can such a shield be found in the Sixth Amendment.

An examination of the purposes served by the suppression of evidence further supports the decision reached below on this issue. The exclusion of reliable evidence is a remedy fashioned by the courts in order to deter impermissible police conduct and to preserve judicial integrity.

Cullen's action in this case was not the type of reprehensible police behavior which the courts feel compelled to discourage. The instructions to Lee suggest a conscious effort on Cullen's part to guard Wilson's constitutional rights while pursuing a crucial homicide investigation. His directions, "Don't ask questions; just keep your ears open," suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah.* Under these circumstances, exclusion of Wilson's confession to Lee would serve no useful purpose. Accordingly, we are of the opinion that there was no infringement of Wilson's Sixth Amendment right to the assistance of counsel.

* * *

We concur in all respects with the decision below.

AFFIRMED.

OAKES, *Circuit Judge* (dissenting):

I respectfully dissent.

* * *

I find the *Massiah*[9] point equally persuasive. In that case, as here, a conceded police agent was used to secure incriminating statements from a represented defendant in the absence of his counsel. There is surely no difference, except one of reliability perhaps, between the radio transmitter used in *Massiah* and the planted cellmate used here. Thus, the only real distinction advanced is that Benny Lee did not "interrogate" Wilson.[10] But the Government did not "interrogate" Massiah.[11] Certainly the Court did

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9. *Massiah* v. *United States,* 377 U.S. 201 (1964).

10. True, *Brewer* v. *Williams,* 430 U.S. 387, 401 (1977), states that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him" (footnote omitted). But I do not think that by the use of this language *Brewer* has sub silentio limited *Massiah.* Justice Stewart's opinion in *Brewer* begins by pointing out that the Court need not rely on *Miranda* because it was "clear" that the Sixth Amendment was violated. Then the Court implicitly concedes that Williams may not have been formally interrogated in the sense proscribed by *Miranda:* "Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." 430 U.S. at 399.

The Court then points out that the state courts had proceeded as if the detective's speech had been "tantamount to interrogation." Throughout the rest of the opinion, the Court must be using "interrogation" to mean *both* formal interrogation and "deliberate eliciting" (which is "tantamount" to formal). The "interrogation" language may be ill chosen, but the Court's statement that the "clear rule" of *Massiah* is that the right to counsel attaches when the State "interrogates" could not by any stretch of the imagination be interpreted as a *limitation* of *Massiah.* The next sentence, indeed, to the effect that it "requires no wooden or technical application" of *Massiah* to conclude that Williams was entitled to counsel, shows that the spirit, as well as the substance, of *Massiah* is alive and well.

11. The *Massiah* Court said:

> A few days later, and quite without the petitioner's knowledge, Colson decided to cooperate with the government agents in their continuing investigation of the narcotics activities in which the petitioner, Colson, and others had allegedly been engaged. Colson

(footnote continued on next page)

not rely on the fact that Massiah was interrogated.[12] Rather, what is critical is whether police conduct "deliberately elicited" information, not the precise manner in which the statements were obtained:

> We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incrimianting words, which federal agents had deliberately elicited

permitted an agent named Murphy to install a Schmidt radio transmitter under the front seat of Colson's automobile, by means of which Murphy, equipped with an appropriate receiving device, could overhear from some distance away conversations carried on in Colson's car.

On the evening of November 19, 1959, Colson and the petitioner held a lengthy conversation while sitting in Colson's automobile, parked on a New York street. By prearrangement with Colson, and totally unbeknown to the petitioner, the agent Murphy sat in a car parked out of sight down the street and listened over the radio to the entire conversation. The petitioner made several incriminating statements during the course of this conversation. At the petitioner's trial these incriminating statements were brought before the jury through Murphy's testimony, despite the insistent objection of defense counsel. The jury convicted the petitioner of several related narcotics offenses, and the convictions were affirmed by the Court of Appeals.

377 U.S. at 202-03 (footnote omitted).

12. The cases cited by the majority are distinguishable. In *United States* v. *Garcia*, 377 F.2d 321 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967), the officer to whom the incriminating statements were made was, in the majority's own words, "unaware of the existence of an indictment and was not seeking information about the crime charged in the indictment." *United States* v. *Hearst*, 563 F.2d 1331, 1347-48 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3665 (U.S. Apr. 25, 1978), also differs from this case since in *Hearst* the incriminating statements were made to Ms. Hearst's friend who was not working for the Government. Their conversation was simply recorded by government agents. The majority's reliance on *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969), is also misplaced. In that case, where an informant was arrested along with the defendant who subsequently made incriminating statements to the informant, the purpose of arresting the informant was not to elicit admissions from the defendant but to protect his cover and his person. *See id.* at 413-14 n.15.

> from him after he had been indicted and in the absence of his counsel. It is true that in the *Spano* [*Spano* v. *New York*, 360 U.S. 215 (1959)] case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent." 307 F.2d, at 72-73.

Massiah v. *United States*, 377 U.S. 201, 206 (1964). As far as I know, *Massiah* is still the law. *See Brewer* v. *Williams*, *supra*, 430 U.S. at 400-01. *See* note 10 *supra*.

I would reverse and grant the writ unless appellant were retried.

APPENDIX F

JOSEPH ALLEN WILSON,
Petitioner-Appellant,

v.

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,
Respondent-Appellee.

No. 832, Docket 78-2015.

United States Court of Appeals,
Second Circuit.

Argued May 23, 1978.

Decided Sept. 20, 1978.

On Rehearing En Banc Decided
Jan. 23, 1979.

A petition for rehearing containing a suggestion that the action [2 Cir., 584 F.2d 1185] be reheard en banc having been filed herein by counsel for the appellant, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Circuit Judges FEINBERG, MANSFIELD, OAKES, and GURFEIN vote to reconsider whether *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), requires reversal of the judgment of the District Court.

Circuit Judges MANSFIELD, OAKES, and GURFEIN also vote to reconsider whether reversal is required by *Massiah* v. *United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

Circuit Judge OAKES has filed a dissenting opinion.

OAKES, Circuit Judge (dissenting):

I wish to have my dissent to the denial of the petition for rehearing en banc noted not to add anything to the substance of what was said in my original dissenting panel opinion but to underscore the importance of the *Miranda* and *Massiah* issues involved, an importance that is emphasized by Professor Yale Kamisar's forthcoming article, *Brewer* v. *Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?,* 67 Geo.L.J. 1 (1978), to be published shortly. I note also that a panel majority of the Fourth Circuit has recently held on the *Massiah* point directly contrary to the panel majority in this case. *Henry* v. *United States,* 590 F.2d 544 (4th Cir. 1978).

No. 84-1479

In the

SUPREME COURT OF THE UNITED STATES

October Term 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

-against-

JOSEPH ALLAN WILSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH ALLAN WILSON,
Pro Se Respondent

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QUESTIONS PRESENTED

Respondent respectfully submits that, should the Court grant a writ of certiorari in this case, the issues presented for review would be:

1. Were the incriminating statements obtained from Wilson by a secret government informant under circumstances identical to those that were determinative in United States v. Henry, 477 U.S. 264 (1980), "deliberately elicited" by the government under the test of United States v. Henry? The Court of Appeals answered this question in the affirmative.

2. In view of the clear violation of Wilson's Sixth Amendment right to counsel under the holding of Henry, was a full review of the merits of Wilson's habeas corpus petition required by the ends of justice? The Court of Appeals answered this question in the affirmative.

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No. 84-1479

In the

SUPREME COURT OF THE UNITED STATES

October Term 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correction Facility,

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-against-

JOSEPH ALLAN WILSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent respectfully submits that the Court should not issue a writ of certiorari in this case because there is no special and important reason for review of the decision of the Court of Appeals for the Second Circuit.

Opinions Below

To the description of the opinions below provided by petitioner, respondent adds the following:

The opinion of the Court of Appeals for the Second Circuit, Wilson v. Henderson, is reported at 742 F.2d 741 (2d Cir. 1984).

The proceedings on Wilson's initial application for a writ of habeas corpus in the United States District Court for the Southern District of New York and in the Court of Appeals for the Second Circuit did not present "precisely the same factual and legal issue" as that raised in Wilson's current application because at the time of the former proceedings, this Court had not yet decided United States v. Henry, 447 U.S. 264 (1980).

This Court denied Wilson's petition for a writ of certiorari in the earlier proceeding, 442 U.S. 945 (1979) because it was untimely.

Constitutional and Statutory Provisions

In addition to the Constitutional and statutory provisions that petitioner cites, the following statutory provisions are applicable:

1. United States Code, Title 28, United States Supreme Court Rule 17.1, which provides in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> a. When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> • • •
>
> c. When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. United States Code, Title 28, section 2253, which provides in pertinent part:

> In a habeas corpus proceeding before a circuit or district judge, the final order

shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

STATEMENT OF THE CASE

In reversing the District Court and granting Wilson's application for a writ of habeas corpus, the Court of Appeals emphasized that under this Court's holding in United States v. Henry, Wilson's conviction had been procured in a manner that violated his Sixth Amendment rights. Wilson v. Henderson, supra, 742 F.2d at 748. The facts as to the state's use of a surreptitious informant to obtain incriminating statements from Wilson after he had been arraigned in the absence of his counsel and the steps Wilson took in his effort to overturn his conviction are not in dispute. Petitioner takes issue exclusively with Wilson's right, after his conviction had become final and the federal courts had denied his first habeas corpus petition, to renew his request for relief on the ground that the decision in United States v. Henry has clarified the proper standard for determining whether his Sixth Amendment rights were violated. In this case, however, the Court of Appeals properly determined that the ends of justice required review of the merits of Wilson's second petition. Having done so, it properly exercised its duty to conduct such a review and correctly decided that Wilson's conviction should be overturned.

A. The Robbery, Wilson's Arrest, and His Arraignment.

On July 4, 1970, an armed robbery of the Star Taxicab Garage was committed during which the on-duty dispatcher was shot and killed. Witnesses identified Wilson, a former Star employee whose brother was still employed there, as being present on the Star premises at about the time of the robbery. Aware that the police were looking for him, Wilson

voluntarily surrendered himself on July 8 and was promptly arrested. After receiving his Miranda warnings, he admitted to Detective Cullen that, while looking for his brother, he came upon the scene of the crime and witnessed the robbery. Wilson told Cullen that he had not participated in the robbery, but fled because he was afraid of being blamed. Counsel was subsequently assigned to him and he was arraigned on July 9, 1970. Wilson was then placed in the Bronx House of Detention.

B. The State's Enlistment and Use of a Secret Informant.

On July 7, 1970, the day before Wilson's arrest, Detective Cullen met with one Benny Lee, an inmate of the Bronx House of Detention whom Cullen had known for five years and previously used as an informant. He told Lee that he was investigating a murder and robbery, showed Lee a photograph of Wilson, and said that he was fairly certain that he would arrest Wilson as a suspect within the next twenty-four hours. Detective Cullen asked Lee whether he knew Wilson and whether there was anything that Lee could do to help him with the case. Lee said that he had "seen him around" but did not know Wilson very well. Cullen then told Lee that, after arresting Wilson, he would have him transferred to Lee's cell in the Bronx House of Detention. Cullen asked Lee to "see if [he] could find out" from Wilson the names of the two perpetrators who had escaped identification.

Lee, who was then a third-time offender awaiting sentencing on a plea of guilty to a reduced charged of robbery in the third degree, had, by his own testimony, previously served as a police informant over 100 times. At Wilson's trial, defense counsel questioned Lee as to whether he received consideration for informing on Wilson, but failed to elicit a comprehensible answer. However, it is certain from Lee's

testimony that he was frequently paid for his services as an informant.

In accordance with the arrangement between Cullen and Lee, Wilson was transferred to Lee's cell in the Bronx House of Detention, which overlooked the Star Taxicab Garage, the scene of the crime.

C. Events Following Wilson's Transfer to Lee's Cell.

Immediately upon entering the cell, Wilson was upset by the view. His first words to Lee were, "Somebody's messing with me because this is the place that I'm accused of robbing." Wilson told Lee that on the night of July 4, he had gone to the Star Garage to see his brother who worked there. Two men approached him near the front door. He directed them to the soda machine inside the garage and then walked inside himself, talked to some people, and bought a soda. Subsequently, he heard two shots and saw the two men* running out of the dispatcher's office stuffing money into their clothes, dropping some of it. Wilson said that he then picked up some of the money and followed the men out of the garage and up the street.

Lee told Wilson, "Look, you better come up with a better story than that because that one doesn't sound too cool to me." Over the next few days, Lee and Wilson "talked about different people in the street" and, according to Lee, Wilson gradually altered the description of events that he had first given. Wilson also received a visit from his brother, who told him that his family was agitated by the shooting. According to Lee, Wilson eventually claimed to have planned and executed the robbery with the two unidentified men.

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* Other witnesses also saw the two men and described them to the police but were unable to identify them. These two individuals were never apprehended.

Wilson and Lee spent about nine or ten days together in the cell overlooking the Star Taxicab Garage. On July 24, 1970, Detective Cullen had another meeting with Lee at the Bronx House of Detention. Lee told Cullen that Wilson had admitted to the planning and execution of the robbery. At this meeting, Lee turned over pages on which he had made notations of "things that [he] thought would be of help to Detective Cullen." Later that year, Lee obtained the $10,000 bail that had been set in his case and was freed pending his sentencing hearing.

Wilson, who was subsequently indicted and charged with murder and felonious possession of a weapon, moved to suppress Lee's testimony at his trial. A pretrial hearing was held pursuant to People v. Huntley, 15 N.Y.2d 72 (1965). The trial court denied Wilson's motion on the grounds that Lee had not "interrogated" Wilson. Consequently, Lee's account of his conversations with Wilson and Lee's notes were admitted into evidence in the State's case against Wilson. Wilson was convicted for both crimes and his direct appeals to the higher courts of the State of New York were futile.

D. Wilson's Initial Application for a Writ of Habeas Corpus.

After his journey through the courts of the State of New York, Wilson filed an application for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming, inter alia, that the admission of Lee's statements violated his Sixth Amendment right to counsel. Relying on an erroneous interpretation of Massiah v. United States, 377 U.S. 201 (1964), under which the state trial court's finding of "no interrogation" of Wilson controlled the determination of whether his incriminating statements to Lee were deliberately elicited by the government, the District Court, Carter, J., rejected this claim.

On appeal, the District Court's denial of habeas corpus was affirmed by the two-to-one vote of a panel of the Court of Appeals for the Second Circuit. District Judges Blumenfeld and Mehrtens (both sitting by designation) voted to affirm the District Court's decision and to deny rehearing, while Circuit Judge Oakes voted to reverse. Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978). A divided court denied rehearing en banc with Circuit Judges Mansfield, Oakes, and Gurfein voting to reconsider whether the District Court's holding with respect to Wilson's Sixth Amendment claim should be reversed. Wilson v. Henderson, 590 F.2d 408 (2d Cir. 1979). In his dissent from the denial of rehearing en banc, Circuit Judge Oakes noted that, with respect to Wilson's Sixth Amendment claim, a majority of the panel of the Fourth Circuit had recently held "directly contrary" to the majority of the panel of the Second Circuit in a case entitled Henry v. United States, 590 F.2d 544 (4th Cir. 1978). 590 F.2d at 409 (Oakes, J., dissenting).

Wilson's petition for certiorari to this Court was denied without opinion because it was untimely. Wilson v. Henderson, 442 U.S. 945 (1979).

E. Wilson's Current Application for a Writ of Habeas Corpus.

Less than four months after this Court denied certiorari in Wilson's case, it granted certiorari in United States v. Henry, 444 U.S. 824 (1979).* This Court subsequently affirmed the decision of the Court of Appeals for the Fourth Circuit, which held that the government's evidentiary use of incriminating statements obtained from an indicted, in-custody defendant by his fellow inmate, a secret government informant,

* This Court denied Wilson's petition for certiorari on June 18, 1979 and granted certiorari in Henry on October 1, 1979.

violated the accused's Sixth Amendment right to counsel. United States v. Henry, 447 U.S. 264 (1980).

In Henry, this Court expressly rejected the government's contention that a finding of interrogation or equivalent verbal conduct by the government or its agent was a necessary element of a violation of the accused's Sixth Amendment right to counsel under its sixteen-year-old decision in Massiah v. United States, 377 U.S. 201 (1964). See Henry, 447 U.S. at 271. That issue had been raised by certain language ("tantamount to interrogation") in the Court's decision in Brewer v. Williams, 430 U.S. 387, 399 (1977) and had remained unresolved prior to the Court's decision in Henry. Compare Henry, 590 F.2d at 546-547 (Winter, C.J.) with Henry, 590 F.2d at 548-550 (Russel, C.J., dissenting).

Attorneys for Wilson took note of this Court's Henry decision, and commenced proceedings in the courts of the State of New York in an unsuccessful effort to obtain relief. All state court remedies were exhausted.*

On July 6, 1982, Wilson again petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus on the ground that his Sixth Amendment right to counsel had been violated under the test promulgated by this Court in Henry and that all relevant considerations militated for the application of the Henry rule to his case. The District Court, Gagliardi, J., denied Wilson's petition by

* On September 11, 1981, Wilson made a motion in the Supreme Court of the State of New York, Bronx County, to vacate his conviction pursuant to section 440.10 of the New York Criminal Procedure Law (the State's habeas corpus statute) on the ground that this Court's recent decision in Henry established that his conviction had been obtained in violation of his Sixth Amendment right to counsel. The motion was denied by order dated November 20, 1981. Wilson's motion in the Appellate Division of the Supreme Court, First Department, for leave to appeal the November 1981 order was denied on January 19, 1982.

opinion and order dated March 30, 1983. (Petitioner's Brief, Appendix C.)

The District Court interpreted Henry as requiring evidence of "an affirmative effort on the part of [the informant] to elicit" incriminating statements from the accused. It noted its agreement with that part of Justice Powell's concurring opinion in Henry, 447 U.S. at 276, in which he interpreted the majority's holding to require that "the informant's actions constituted deliberate and 'surreptitious interrogatio[n]' of the defendant." The District Court distinguished Wilson from Henry, noting that Lee had not made an "affirmative effort" to question Wilson. Because of its holding that Wilson's case was distinguishable from Henry, the District Court did not rule on the "retroactivity" issue of whether the holding of Henry should be applied in this case.

The Court of Appeals for the Second Circuit reversed. Wilson v. Henderson, 742 F.2d 741 (2d Cir. 1984). It rejected the State's argument that principles of finality should be determinative of Wilson's application, and went on to consider his application for habeas corpus because the ends of justice required it. 742 F.2d at 743. It analyzed Henry and Wilson, and concluded that they are indistinguishable. 742 F.2d at 745. This conclusion is not a new one, but one that had previously been reached by two Justices of this Court and judges of three Courts of Appeals. United States v. Henry, 447 U.S. at 281 (Blackmun and White, JJ., dissenting); Henry v. United States, 590 F.2d 544, 553 (4th Cir. 1978) (Russel, J., dissenting); Wilson v. Henderson, 590 F.2d 408, 409 (2d Cir. 1979) (Oakes, J., dissenting); and United States v. Sampol, 636 F.2d 621, 637-638 (D.C. Cir. 1980) (per curiam). The Court of Appeals held that, under Henry, the government had deliberately elicited incriminating statements from Wilson in violation of his Sixth Amendment right to counsel. 742 F.2d at 745.

The Court of Appeals also held, with respect to the issue of the retroactivity of Henry, that it established no new rule of law so that it is automatically applicable to prior cases. 742 F.2d at 747. Recognizing that Henry is fully applicable to Wilson, the Court held that Wilson's conviction on the basis of incriminating statements elicited by the government through a secret jailhouse informant necessarily contravened his Sixth Amendment right to counsel, 742 F.2d at 748, and ordered that Wilson be released from custody unless the State elects to try him anew.

Summary of the Argument

United States Supreme Court Rule 17.1 provides, without limiting the Court's discretion, that a writ of certiorari will be granted "only when there are special and important reasons therefor." Wilson respectfully submits that there is no such significant reason for this Court to review the decision of the Court of Appeals. Petitioner's arguments in support of granting the writ amount to nothing more than an expression of dissatisfaction with the outcome below.

Petitioner proposes that this Court review this case in order to amplify its decision in Henry. In Part I below, Wilson submits that the Court of Appeals correctly interpreted Henry and applied Henry to it the facts of Wilson. The decision below leaves no room for ambiguity as to the limits imposed by the Sixth Amendment on the State's use of secret informers against arraigned or indicted prisoners.

Petitioner also proposes that this Court grant a writ of certiorari so that, through this case, it can curtail the power of the lower federal courts to grant full review on the merits to a habeas corpus petitioner whose conviction, the constitutionality of which is in question, has survived one round of collateral attack. In Part II below, Wilson submits that this Court and Congress have determined that the federal courts have broad discretion to review successive petitions for a writ of habeas corpus, that these courts have a duty to conduct such review when the ends of justice require it, and that the Court of Appeals correctly carried out this duty.

ARGUMENT

THE COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI.

The gravamen of Wilson's habeas corpus application is that he was convicted in a manner that today we recognize as repugnant to the Constitution. The Court of Appeals, in reversing the District Court, acknowledged that Wilson could not now be constitutionally convicted on the basis of Lee's testimony. Petitioner argues that the Court of Appeals should be stripped of the power to revisit decisions of its own and to review those of the lower courts, all of which were handed down before this Court definitively passed on the pivotal question raised in those earlier proceedings. In light of this Court's Henry decision, it is now apparent that those earlier courts erred. Wilson's plea is that those errors now be set right and the law, as we currently understand it, be applied even-handedly to him.

Petitioner asks this Court to review many fragmentary issues concerning the context and manner in which Wilson attacked his conviction. Wilson replies that the Court of Appeals had the power to, and did, review his conviction in light of Henry. Moreover, the Court of Appeals decided correctly.

I. The Decision of the Court of Appeals Is in Harmony with the Precedents of This Court.

This Court's opinion in United States v. Henry, 447 U.S. 264 (1980), identified the circumstances under which it violates the accused's Sixth Amendment right to counsel for the government to procure incriminating statements from him through the use of a secret informant:

> Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

447 U.S. at 270. The presence of these three factors led the Court to hold: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." 477 U.S. at 274.

Until this Court's decision in Henry, Massiah was the primary precedent available to the trial and appellate courts that examined the validity of the police methods used in Wilson's case. In Massiah, this Court held that incriminating statements deliberately elicited from the accused by government agents in the absence of his counsel and recorded by means of a radio transmitter secretly installed in the accused's automobile were obtained in violation of his Sixth Amendment rights. Because the facts of Massiah were markedly different from those of Henry or Wilson, confusion existed as to which aspects of the process of "deliberate elicitation" were determinative.

Until the instant decision of the Court of Appeals in Wilson's case, the courts interpreting Massiah and attempting to apply it to the facts of Wilson uniformly focused on the lack of any direct "interrogation" of Wilson by Lee. See Wilson v. Henderson (unreported decision of Carter, J., attached as Appendix D to Petitioner's Brief) (S.D.N.Y. 1977) pp. 32a-33a; Wilson v. Henderson, 584 F.2d 1185, 1190 (2d Cir. 1978); Wilson v. Henderson (unreported decision of Gagliardi, J., attached as Appendix C to Petitioner's Brief) (S.D.N.Y. 1983) pp. 28a-29a. In this, they were led astray by language in Brewer v. Williams, 430 U.S. 387 (1977), characterizing the investigating detective's conversation with the accused as "tantamount to interrogation." 430 U.S. at 399 n.6. However, it is now clear that Brewer does not limit Massiah, but reiterates in a different context the rule that a

government agent may not deliberately elicit incriminating information from the accused in the absence of his attorney when the right to have an attorney present has attached.*

The District Court, in reviewing Wilson's conviction pursuant to his current application for habeas corpus, erred because it searched the record for evidence that Lee "affirmatively secured the incriminating evidence from the accused," rather than whether the government had created a situation in which the accused was likely to make such statements to the informant. The District Court concluded, "Since the record plainly establishes that Lee's actions did not constitute surreptitious interrogation of the petitioner, the admission into evidence of petitioner's incriminating statements did not abridge his Sixth Amendment right to counsel." (Petitioner's Brief, Appendix C, p. 29a.)

In reversing that decision, the Court of Appeals made clear that the appropriate inquiry under Henry as to an arraigned, in-custody defendant is to determine whether "the government intentionally staged the scene that induced [the accused] to make the inculpatory statements" to the secret informant. 742 F. 2d at 745. The Court of Appeals undertook that analysis and decided that the very circumstances this Court considered determinative in Henry were present here. 742 F.2d at 745. The Court of Appeals has the power to review issues such as these on appeal from the District Court. 28 U.S.C. § 2253. Thus, the decision of the Court of Appeals, being indisputably in harmony with Henry and Massiah, leaves in its wake no special or important reason for this Court to

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* In Brewer, this Court noted that the government agent "deliberately and designedly set out to elicit information from Williams just assuredly as -- and perhaps more effectively than -- if he had formally interrogated him," 430 U.S. at 399, and held such a tactic to be unconstitutional.

review it under the standard set forth in Rule 17.1 of this Court.

II. The Court of Appeals Properly Conducted a Review of the Merits of Wilson's Application for Habeas Corpus as Required by the Ends of Justice.

Petitioner urges this Court to grant certiorari in this case to take the opportunity judicially to rewrite 28 U.S.C. § 2244. (Petitioner's Brief at 14.) The standard that petitioner asks this Court to adopt would preclude review of successive habeas corpus petitions unless the federal court could satisfy a burdensome test grafted onto the standard of Sanders v. United States, 373 U.S. 1 (1968). (Petitioner's Brief at 17.) According to petitioner, such a rewriting would serve to reaffirm the presumption of correctness accorded to state trial court findings of fact under 28 U.S.C. § 2254(d). (Petitioner's Brief at 12-13.)

Contrary to petitioner's contentions, however, Wilson neither subverts the principles underlying 28 U.S.C §§ 2244(b) and 2254(d), nor does it reveal a "critical void" in the statutory framework governing successive collateral attacks on final convictions. The decision of the Court of Appeals granting Wilson's habeas corpus application was an appropriate exercise of its duty to review that narrow subset of successive applications where the ends of justice warrant it. In conducting its review, the Court of Appeals did not in any way denigrate the role of 28 U.S.C. § 2244(b), which provides for summary dismissal of nonmeritorious, or repetitious, successive petitions; rather it reinforced the distinction between abusive successive petitions and meritorious successive petitions, such as Wilson's, which § 2244(b) was intended to preserve.

Further, in reviewing Wilson's petition, the Court of Appeals correctly perceived the scope of the presumption of

correctness accorded state trial court findings of fact under 28 U.S.C. § 2254(d). By independently weighing the state court's factual findings and reaching its own conclusions as to the legal significance of those facts, the Court of Appeals properly exercised its authority to determine mixed questions of law and fact while leaving undisturbed the basic factual findings of the state trial court.

A. The Court of Appeals Correctly Determined That Review of Wilson's Application Was Required to Serve the Ends of Justice.

In Sanders v. United States, 373 U.S. 1 (1963), this Court articulated the parameters of the federal courts' discretionary power to dismiss successive habeas corpus petitions under the provisions of former 28 U.S.C. § 2244, predecessor of the current 28 U.S.C. §§ 2244(a) and 2244(b):

> [E]ven with respect to successive applications on which hearings may be denied because the ground asserted was previously heard and decided . . . § 2244 . . . does not enact a rigid rule. The judge is permitted, not compelled, to decline to entertain such an application, and then only if he "is satisfied that the ends of justice will not be served" by inquiring into the merits.

373 U.S. at 12 (emphasis added). By requiring that the lower federal courts accord full review on the merits to those successive petitions that present compelling circumstances for habeas corpus relief, Sanders reaffirmed the basic principle underlying the writ of habeas corpus that the vindication of Constitutional rights takes precedence over considerations of judicial economy and finality. 373 U.S. at 7-8.

As its legislative history makes clear, the present 28 U.S.C. § 2244(b) was enacted to "alleviate the unnecessary burden" resulting from "state prisoners filing [habeas corpus] applications either containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds obviously well known to them when they

filed the preceding application" while nonetheless "safeguard[ing] the substantial rights of the applicant for the writ." S. Rep. No. 1797, 89th Cong., 2nd Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 3663-3672. Accordingly, 28 U.S.C. § 2244(b) was not intended to tip the scales in favor of judicial economy and finality of state court convictions over substantial rights or even to place these competing considerations on an equal footing. Rather, it was designed to equip the federal courts with the means to deal summarily with certain blatant abuses of the habeas corpus process while leaving intact the principle announced in Sanders that the federal courts have a duty to conduct a full review of a successive habeas corpus petition if the ends of justice would be served thereby. 373 U.S. at 18-19.

The legislative history of Rule 9(b) of the Rules Governing Cases and Proceedings under 28 U.S.C. § 2254, enacted ten years after 28 U.S.C. § 2244(b), confirms the Sanders principle. After noting that, "[a]s promulgated by the Supreme Court, [Rule 9(b)] permitted a judge to dismiss a petitioner's second or successive petition, even if the petition alleged new and different grounds for relief, if the judge found that the failure to assert those grounds in a prior petition was 'not excusable,'" the House Committee on the Judiciary noted that:

> The legislation amends Rule 9(b) . . . by deleting the "not excusable" standard. . . . The Committee believes that the "not excusable" language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition. The "abuse of writ" standard brings Rule 9(b) into conformity with existing law. As the Supreme Court has noted in reference to successive § 2255 motions based upon a new ground or a ground not previously decided on the merits, "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading."

H.R. Rep. No. 1471, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 2478-2482 (citing Sanders v. United States, supra, and 28 U.S.C. § 2244(b), supra) (emphasis added).

In deciding not to give controlling weight to the denial of Wilson's previous petition pursuant to 28 U.S.C. § 2244(b) and Rule 9(b) on the ground that a full review of the merits of Wilson's petition was required to serve the ends of justice, the Court of Appeals carried out this Court's mandate in Sanders, which has guided more than two decades of lower federal court decisions and survived two occasions of legislative revision. The decision of the Court of Appeals to conduct a full review of Wilson's application for habeas corpus was based on its recognition that no previous court petitioned by Wilson had properly applied Henry's "deliberately elicited" test to the facts of Wilson's case:

> [W]e hasten to point out that the courts considering this matter earlier did not have the benefit of the Henry decision as we now do. Without it, the prior panel relying on Brewer v. Williams, 430 U.S. 387 (1977), concluded that the "deliberate elicitation" standard required evidence of "interrogation" as a prerequisite. Since the state trial judge found that there had been no "interrogation" of Wilson by his cellmate, the panel concluded that this negated the proposition that Wilson's statements were deliberately elicited . . . . The earlier panel also found no distinction between incriminating statements voluntarily made by a defendant to a known government officer and statements made to an undercover agent acting surreptitiously . . . . Henry substantially distinguished these two situations.

742 F.2d at 747. In Sanders, this Court pointed out that:

> Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground . . . . If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application . . . . [T]he foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized.

373 U.S. at 16-17 (citation omitted). While the Court of Appeals did not regard Henry as a change in the law, it

recognized that in light of Henry's clarification of Massiah's "deliberately elicited" test, the review conducted on the merits of Wilson's Massiah claim in his first petition was seriously deficient. Its decision to grant full review of the merits of Wilson's petition on this ground is consistent not only with Sanders but with the long-standing practice in the lower courts with respect to the consideration of successive habeas corpus petitions.*

* See Ford v. Strickland, 734 F.2d 538, 539-40 (11th Cir. 1984), aff'd, 82 L.Ed.2d 911 (1985) (certificate of probable cause granted with respect to second petition which raised new claim based on evidence and legal precedent not available at time of first petition); Bass v. Wainwright, 675 F.2d 1204, 1206-08 (11th Cir. 1982) (full review granted with respect to second petition, to serve the ends of justice, where the denial of the first petition rested on a plain errors of law); Cancino v. Craven, 467 F.2d 1243, 1246 (9th Cir. 1972) (same holding); St. Pierre v. Helgemoe, 545 F.2d 1306, 1308-09 (1st Cir. 1976) (full review accorded second petition where development of new law occurred after denial of first petition); Alford v. North Carolina, 405 F.2d 340, 342-43 (4th Cir. 1968), rev'd on other grounds, 400 U.S. 25 (1970) (same holding); United States v. Henderson, 520 F.2d 896, 904 (2d Cir.), cert. denied, 425 U.S. 998 (1975) (full review granted with respect to second petition where determinative issues of fact raised in first petition apparently were ignored); see also Hobbs v. Pepersack, 301 F.2d 875, 879-880 (4th Cir. 1962) (full review granted where the prisoner in his previous seven petitions had sought but never obtained an adjudication of the merits of his claims).

The case of U.S. ex rel. Schnitzler v. Follette, 406 F.2d 319 (2d Cir.), cert. denied, 395 U.S. 927 (1969), discussed in Petitioner's Brief at 18, is distinguishable from the above cases and from this case in two respects: first, in Schnitzler, there was no special circumstance, such as an intervening change of law or the issuance of a controlling Supreme Court opinion clarifying an unclear body of precedent, which occurred between the denial of the first petition and the filing of the second petition; and second, as the Court of Appeals for the Second Circuit pointed out in Schnitzler, "[b]y entertaining [the second habeas corpus application] the district court improperly functioned as a court of review over a judgment of its superior Court of Appeals." 406 F.2d at 322.

There is no basis in "principles of deference to state court determinations and finality of judgments" (Petitioner's Brief at 13) warranting review of the Court of Appeals determination. Less than a year ago, this Court addressed "the extent of a federal court's powers in ruling upon an issue raised in a successive petition for a writ of habeas corpus" (Id. at 13) in the case of Reed v. Ross, 52 U.S.L.W. 4905 (June 27, 1984). While Reed concerned the application of the "cause and prejudice" requirement to a successive petition that raised a new ground for relief, the competing concerns at issue there were identical to those that petitioner raises in its request for a writ of certiorari:

> On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners. . . . On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments. . . .

52 U.S.L.W. at 4908 (citations omitted). Reed made clear that the priorities embodied in the writ of habeas corpus and reaffirmed in Sanders are still intact:

> It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so worded when the cases were in state court that no one would have recognized them. This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.

52 U.S.L.W. at 4909. Accordingly, a reconsideration of those priorities clearly is not warranted.

Indeed, a judicial reordering of those priorities to restrict federal review of non-abusive successive habeas corpus petitions would subvert Congress's intent in enacting 28 U.S.C. § 2244(b) and Rule 9(b). This Court's interpretation in Sanders of the federal courts' discretion and duty to review the merits of successive petitions was at least partially

informed by Congress's rejection of a bill which would have made principles of res judicata generally applicable to federal habeas corpus. See Sanders, supra, 373 U.S. at 11. In light of Congress's intention to maintain the availability of full federal review for successive petitions in 1966 and 1976, this Court should not attempt "drawing such a line of demarcation" (Petitioner's Brief at 19).

B. The Court of Appeals Decided the Issues Raised by Wilson's Application Consistently with the Requirements of 28 U.S.C. § 2254(d).

At the Huntley hearing, the state trial court made one factual finding, that Lee, the state's informant, did not interrogate Wilson. On the basis of this finding, it concluded that Wilson's statements were "spontaneous" and "voluntary." It failed to consider whether either the government's placing Wilson in a cell overlooking the scene of the crime, or his being prompted to change his story by an informer who had been instructed to extract information from him, or the subtle psychological inducements of proximity to and confidence in his fellow cellmate were factors that caused Wilson to talk to Lee in the absence of his counsel. The holding of Henry, however, is that a court must examine all the circumstances to determine whether they amount to the creation by the government of a situation likely to induce the prisoner to make an inculpatory statement in the absence of his counsel. This the state court and the District Court failed to do. The Court of Appeals undertook this inquiry, and held (not found) that the government's actions constituted "deliberate elicitation." 742 F.2d at 748.

The issue raised by Wilson's habeas corpus petition, whether the government "deliberately elicited" incriminating statements in the absence of his counsel under Massiah and

Henry, involves the application of the law as announced by this Court to the undisputed facts. That the habeas corpus application involves a state prisoner, and that there was a factual hearing in the state court, provide no grounds under 28 U.S.C. § 2254(d) for deference on a question of Constitutional law.

In considering the issue of whether Wilson's statements to his cellmate-informant were "deliberately elicited" by the government, the Court of Appeals did not reexamine or dispute the state trial court's factual finding that Lee did not interrogate Wilson. 742 F.2d at 747-748. Rather, it determined that this fact should not be accorded controlling significance with respect to the issue of deliberate elicitation, as had been done in every previous consideration of the merits of Wilson's Sixth Amendment claim. The Court of Appeals reached its holding based on the facts that Lee was placed in Wilson's cell to function as a surreptitious government informant; that Wilson's cell overlooked the scene of his alleged crime and made him uneasy; and that Lee's ongoing verbal intercourse with Wilson served to exaggerate Wilson's already troubled state of mind, all of which were part of the state trial court record and were never in dispute. The Court of Appeals arrived at the mixed determination of law and fact that:

> Since the government intentionally staged the scene that induced Wilson to make the inculpatory statements, it may be held to have deliberately elicited them in violation of Wilson's Sixth Amendment right to counsel.

742 F.2d at 745.

Contary to petitioner's contention (see Petitioner's Brief at 11-13), the holding of the Court of Appeals did not transgress any of the requirements of 28 U.S.C. § 2254(d) and does not imperil the interests that this statutory provision

was designed to advance. In ruling on Wilson's Sixth Amendment claim, the Court of Appeals was entitled to "give different weight to the facts as found by the state court and [to] reach a different conclusion in light of the [applicable] legal standard." Sumner v. Mata, 455 U.S. 591, 598 (1982); see also Cuyler v. Sullivan, 446 U.S. 335 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Neil v. Biggers, 409 U.S. 188 (1972). It did no more than that. It discarded the state trial court's incorrect legal conclusion, to which it owed no debt of deference under 28 U.S.C. § 2254.

Respondent respectfully submits that the decision of the Court of Appeals is consistent with the applicable decisions of this Court and does not conflict with any established principle of law or depart from the accepted and usual course of judicial proceedings.

CONCLUSION

For these reasons, the Court should not issue a writ of certiorari in this case.

Respectfully submitted,

JOSEPH ALLAN WILSON,
Pro Se Respondent

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Of Counsel

No. 84-1479

SUPREME COURT OF THE UNITED STATES

HON. ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioner,

- against -

JOSEPH ALLAN WILSON,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Philip S. Weber, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and am of counsel to respondent, Joseph Allan Wilson.

2. On May 31, 1985, I served the within Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit on counsel for petitioner, Mario Merola, District Attorney, 215 East 161st Street, Bronx, New York 10451, by mailing a true copy of the same by depositing it in a sealed wrapper, postage prepaid, in a mailbox maintained by the United States Postal Service in the City of New York.

Philip S. Weber
Philip S. Weber

Sworn to before me this
31st day of May 1985

Evelyn Dalmeda
Notary Public

EVELYN DALMEDA
Notary Public, State of New York
No. 31-4764616
Qualified in New York County
Commission Expires March 30, 1986

No. 84-1479

IN THE

Supreme Court of the United States

October Term 1984

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

JOINT APPENDIX

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Counsel for Respondent

Petition for Certiorari Filed March 18, 1985
Certiorari Granted June 24, 1984

TABLE OF CONTENTS

Chronological List of Relevant Docket Entries

No. 84-1479

Henderson v. Wilson

Date	*Docket Entry*
August 27, 1970	Bronx County indictment number 2839/70 is filed, charging Joseph Allan Wilson with murder and possession of a weapon as a felony.
April 12-13, 1972	Pursuant to Wilson's motion to suppress statements he made to Detective Walter Cullen and to Benny Lee, a pre-trial *Huntley* hearing is conducted in Supreme Court of the State of New York, Bronx County before Hon. Edward T. McCaffrey. At the conclusion of the hearing, the Court denies Wilson's motion.
April 17-20, 1972	A jury trial is conducted in Supreme Court of the State of New York, Bronx County. At the conclusion of the trial, Wilson is found guilty of all charges contained in the indictment.
May 18, 1972	Wilson is sentenced to an indeterminate term of twenty years to life imprisonment pursuant to his murder conviction and to a concurrent, indeterminate term of not more than seven years pursuant to his conviction of possession of a weapon as a felony.

Chronological List of Relevant Docket Entries

Date	*Docket Entry*
April 23, 1973	The Supreme Court of the State of New York, Appellate Division, First Department, affirms Wilson's judgment of conviction.
October, 1973	Leave to appeal to the Court of Appeals of the State of New York is denied.
December 7, 1973	Wilson, *pro se,* files a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York [83 Civ. 5186 (RCL)]. He claims, ***inter alia,*** that his statements to Benny Lee were obtained in violation of the Sixth Amendment.
January 18, 1974	The State of New York, represented by the New York State Attorney General, files its response.
February 13, 1974 March 25, 1974	Wilson files his reply.
January 7, 1977	United States District Judge Robert L. Carter issues an order, with an accompanying opinion, denying Wilson's petition for a writ of habeas corpus.
April 12, 1977	Wilson files a notice of appeal from the District Court's order.
May 23, 1978	Wilson's appeal is argued before the United States Court of Appeals for the Second Circuit (78-2015). Wilson is represented by assigned counsel, Jeffrey Ira Zuckerman.

Chronological List of Relevant Docket Entries

Date	*Docket Entry*
September 20, 1978	The Court of Appeals for the Second Circuit affirms the District Court's order denying Wilson's petition. Circuit Judge James L. Oakes files a dissenting opinion.
October 10, 1978	Wilson submits a petition for rehearing containing a suggestion for rehearing en banc.
January 23, 1979	The Court of Appeals for the Second Circuit denies Wilson's petition for rehearing.
April 27, 1979	Wilson files a petition for a writ of certiorari in this Court.
June 18, 1979	This Court denies Wilson's petition for a writ of certiorari.
September 11, 1981	Wilson files a motion in the Supreme Court of the State of New York, Bronx County, seeking to vacate the judgment of conviction on the ground that the state's use of his statements to Benny Lee violated his constitutional right to counsel.
November 20, 1981	The Supreme Court of the State of New York, Bronx County, per Justice Joseph Cohen, denies Wilson's motion.
January 19, 1982	The Supreme Court of the State of New York, Appellate Division, First Department, denies Wilson's application for leave to appeal.

Chronological List of Relevant Docket Entries

Date	*Docket Entry*
July 2, 1982	Wilson, represented *pro bono* by Ida C. Wurczinger and Philip S. Weber, files a second petition for a federal writ of habeas corpus based on his claim that his statements to Benny Lee were obtained in violation of the Sixth Amendment and a motion for an order pursuant to Fed. R. Civ. P. 60(b)(6) vacating the prior order which denied the original petition for a writ of habeas corpus [82 Civ. 4397 (LPG)].
August 19, 1982	The State of New York, represented by the Bronx County District Attorney, files a response to the petition and motion.
August 30, 1982	Wilson files a reply memorandum.
October 27, 1982	United States District Judge Lee P. Gagliardi hears oral argument by counsel for Wilson and counsel for the state.
March 30, 1983	District Judge Gagliardi issues a memorandum decision dismissing the petition for a writ of habeas corpus and denying the Rule 60(b)(6) motion.
April 18, 1983	Wilson files a notice of appeal from the District Court's order.
December 14, 1983	Three justices of the Court of Appeals for the Second Circuit grant a certificate of probable cause to pursue an appeal of the denial of a writ of habeas corpus.

Chronological List of Relevant Docket Entries

Date	*Docket Entry*
April 5, 1984	The United States Court of Appeals for the Second Circuit hears oral argument on the appeal from the dismissal of Wilson's petition for a writ of habeas corpus.
August 27, 1984	The Court of Appeals for the Second Circuit reverses the judgment of the District Court, which denied Wilson's application for habeas corpus relief, and remands with instructions to grant Wilson's application and to direct his release unless the State elects to retry him. Circuit Judge Ellsworth A. Van Graafeiland files a dissenting opinion.
September 10, 1984	The Bronx County District Attorney, on behalf of the State of New York, files a petition for rehearing containing a suggestion for rehearing en banc.
December 17, 1984	The Court of Appeals denies the petition for rehearing.

Documents Included in Appendix to Petition For a Writ of Certiorari

The following documents have been omitted in the printing of this Appendix because they are included in the appendix to the petition for a writ of certiorari filed in this Court on March 18, 1985:

1. Opinion of the United States Court of Appeals for the Second Circuit, August 27, 1984 (the decision in question on this appeal) (Appendix A).

2. Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing, December 17, 1984 (Appendix B).

3. Memorandum Decision of United States District Judge Lee P. Gagliardi, March 30, 1983 (Appendix C).

4. Opinion of United States District Judge Robert L. Carter, January 7, 1977 (Appendix D).

5. Opinion of the United States Court of Appeals for the Second Circuit, September 20, 1978 (Appendix E).

6. Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing, January 23, 1979 (Appendix F).

Transcript of Proceedings

SUPREME COURT: STATE OF NEW YORK

PART 20: BRONX COUNTY

Indictment # 2839/70

Charge: Murder and Possession of Weapon

PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH ALLEN WILSON,

Defendant.

HEARINGS & TRIAL

Commencing April 12, 1972

Bronx County Courthouse
851 Grand Concourse
Bronx, N.Y. 10451

Before:

HON. EDWARD T. McCAFFREY,
Justice.

Appearances:

FOR THE PEOPLE:
BURTON B. ROBERTS, ESQ.,
District Attorney
County of Bronx
By: ROBERT CANTOR, ESQ.,
Ass't District Attorney.

FOR DEFENDANT:
ALFRED H. ADLER, ESQ.,
445 Park Avenue
New York, N.Y.
(Pursuant to Assignment)

COURT CLERK:
H. KURTZ

HERBERT H. LANDMAN
Official Court Reporter, C.P., C.M.

• • •

Selected Hearing Testimony of Detective Walter Cullen

[10] DETECTIVE WALTER J. CULLEN, Shield 1778, 9th Detective District Homicide Assault Squad, New York City Police Department, having been called as a witness by and on behalf of the People, testified as follows:

Direct examination by Mr. Cantor:

Mr. Cantor: If your Honor please, I have an application and that is that all witnesses be excused from the courtroom.

The Court: Does the defense have any witnesses in the courtroom at this time?

Mr. Adler: No, sir.

Mr. Cantor: There are two witnesses, your Honor, namely the mother of the defendant and the brother of the defendant who very well may be called by the People at the trial of this action. I ask they be excused from this courtroom.

[11] Mr. Adler: You're discussing the trial of the action.

Mr. Cantor: Yes. Well, there's information to be disclosed here, Your Honor, that bears critically on the trial.

The Court: All right. Exclude all witnesses and potential and otherwise.

Court Officer: Step outside, officer, please.

The Court: Outside, please.

(Potential witnesses leave courtroom.)

Mr. Adler: The defendant informs me that there will be—these parties will not be witnesses, Judge.

The Court: For him, but Mr. Cantor has indicated they may be called by the People.

Mr. Adler: All right.

Selected Hearing Testimony of Detective Walter Cullen

Q. Det. Cullen, in July of 1970, were you a member of the New York City Police Department?

A. Yes.

Q. And for how many years have you been as of this date a member of the New York City Police Department?

A. Of the 1st of February, seventeen years.

[12] Q. Det. Cullen, in July, more specifically, July 4, 1970, what was your assignment within the Police Department?

A. I was assigned to the Bronx Homicide Squad.

Q. Det. Cullen, do you know who the arresting officer in this case is?

A. Yes.

Q. Who is that?

A. Det. Dunn, D-u-n-n.

Q. And did you assist on the investigation of this case?

A. Yes, I did.

Q. Det. Cullen, let me refer you to July 8, 1970. On that particular date, how many days had passed since the commission of the homicide in question?

A. Four.

Q. And on that particular date, sir, in the morning did you find yourself in a particular police station house?

A. The morning of the 8th?

Q. Yes.

A. Yes, in the 44 Squad.

Q. Is that in the 44th Detective Squad, sir?

A. Yes.

[13] Q. Now, at approximately 10:45 or 11 o'clock on that date, Det. Cullen, did you receive a telephone call?

A. I did.

Q. And tell his Honor from where that telephone call emanated, sir?

A. From the 42nd Precinct—42nd Squad, I'm sorry.

Q. And the subject matter of the conversation of that telephone call, Det. Cullen, to what did that pertain?

Mr. Adler: I object to that, Your Honor.
The Court: Sustained.

Q. Det. Cullen, did there come a time that that telephone call came to a close?
A. Yes.
Q. Was over?
A. Yes.
Q. And let me refer you, Det. Cullen, to about 11:10 or 11:20, later on that morning; were you still at the 44th Detective Squad?
A. Yes.
Q. And at that particular time, Det. Cullen, did some civilians come into that Detective Squad?
A. Yes.
[14] Q. How many, sir?
A. Two.
Q. Do you see one of those two civilians here in court today?
A. Yes.
Q. Point him out, please.
A. The defendant, seated at the bench beside counsel.

Mr. Cantor: May the record indicate the witness has pointed to the defendant.

Q. And who accompanied defendant into the Squad, sir?
A. His brother.
Q. Do you know the brother's name?
A. Yes, Michael Wilson.
Q. And do you know the defendant's name?
A. Yes.
Q. And what is his name, sir?
A. Joseph Allen Wilson.

Q. At that particular time was there a conversation in the defendant's presence between yourself and Michael Wilson when they first came in?
A. Yes.
Q. What did Michael Wilson say to you?

Mr. Adler: I object [illegible].

[15] Q. In the defendant's presence.

Mr. Adler: I object unless there was some acquiescence on the part of the defendant.

Mr. Cantor: May I briefly say this, Judge, that this is a preliminary hearing, a voluntariness hearing, and by the statutory mandate hearsay evidence is admissible at a pre-trial hearing.

The Court: Objection overruled.

Mr. Adler: Exception, if Your Honor please.

Q. What did Michael Wilson tell you, sir, in the presence of the defendant when he came in with the defendant?
A. Well, we introduced ourselves to one another.
Q. Well, that's a characterization. Tell us what Michael Wilson, to the best of your recollection in substance and effect, said to you.

Mr. Adler: Well, I object to substance and effect. I want to get his best recollection of what he said.

The Court: Give us your best recollection of what was said.

Q. By way of introduction, I mean.
A. He introduced himself as Michael Wilson. He introduced his brother.
[16] Q. And how did he introduce his brother?
A. His brother, Joseph.
Q. And you introduced yourself, sir?
A. Yes, Det. Dunn introduced himself.

Q. Was Det. Dunn with you in the 44th Squad at that time?

A. Yes, he was.

Q. All right. And upon Michael Wilson introducing himself and his brother and you introducing yourself and Det. Dunn, what, if anything, did you say to this defendant?

A. I told the defendant he was under arrest.

Q. Did you tell him for what, sir?

A. For the murder of Samuel Reiner.

Q. At that particular time did you say something in this defendant's presence to his brother, Michael Wilson?

A. No.

Mr. Adler: Same objection, if Your Honor please.
The Court: Same ruling.
Mr. Adler: Exception.

Q. Det. Cullen—

The Court: The answer was no.
[17] Mr. Adler: Yes, sir, thank you.

Q. Det. Cullen, what then happened after you placed or informed this defendant that he was under arrest?

A. Well, I had a short conversation with his brother.

Q. Well, that's what I'm asking about. What did you say to his brother and what did his brother say to you?

A. Oh, may I refer to my record, Your Honor, please?

The Court: Yes.

A. His brother introduced himself, giving his address and everything else, and then he said his brother, Joseph Allen Wilson, had called him—

Mr. Adler: I can't hear him, I'm sorry, Detective.
The Court: Keep your voice up.

A. Excuse me. He said, "My brother Joseph Allen Wilson, had called him that morning."

Q. Detective Cullen, where was this conversation taking place?

A. This was in the Squad Commander's Room in the 44.

Q. Let's go back, Det. Cullen. We're still in the 44th Squad. You have introduced yourself and Detective Dunn to this defendant and his brother after [18] his brother introduced himself and the defendant to you and Det. Dunn. Now, you're still in the Squad proper. At that particular time, did you make a request of the defendant's brother, Michael Wilson, in this defendant's presence?

A. Yes.

Q. Was that a verbal request?

A. Yes.

Q. What is that you said to the defendant's brother, Michael Wilson?

A. I said—

Mr. Adler: I object to all of this, Your Honor. May I have a continuing objection so that there will be no more interruption.
The Court: Objection overruled.
Mr. Adler: Thank you.

A. I asked him if I could speak to him.

Q. What was his reply?

A. Yes.

Q. Where did you go?

A. We went into the Squad Commander's Office. [Illegible] at the desk. He sat alongside the desk. And [illegible] we had that conversation.

Q. How long a period—This was just you and the [19] defendant's brother, Michael Wilson; is that correct?

A. Yes.

Q. How long a period of time were you engaged in conversation in the Squad Commander's Room with the defendant's brother, approximately?

A. A little over five minutes, a little less.

Q. Did there come a time when the conversation was at an end?

A. Yes.

Q. Did Michael Wilson leave that room?

A. Yes, he did.

Q. At that particular time what happened after Michael Wilson left that room?

A. [Illegible] over to his brother—

> Mr. Adler: Well, now, when he says did he [illegible] that room, Judge, that is certainly leading, and the point of hearsay. I'd like to know if he left of his own volition or he was directed to, unless you want me to take it on cross.
>
> The Court: Objection overruled.

Q. Describe for the Court how the defendant's brother, Michael Wilson, left that room?

A. Our conversation was over, and he got up. I opened the door. He walked out.

[20] Q. At that particular point, where was the defendant when the defendant's brother walked out?

A. To the best of my recollection, the defendant was seated on a bench with Det. Dunn in the Squad Room.

Q. What happened at that point as the defendant's brother was walking into the Squad Room, what did you discuss?

A. I observed him have a short conversation with his brother, with the defendant.

Q. What happened after that short conversation was over between the defendant and his brother?

A. Then Det. Dunn and the defendant came into the Squad Detective's Office.

Q. Now, I want you to describe for the Court, if you would be so kind, the physical layout of the 44th Squad upstairs when you first come in.

A. Well, as you enter, there's a short—or a narrow part, like a—

Q. An anteroom?

A. Not an anteroom. It's just a partitioned off, with a door that's locked. And you can go in and out that way.

Q. Is that a swinging-gate door?

A. It's a swinging gate, yes.

[21] Q. And when you passed by that gate door from the first room that you're in, what room do you then come into?

A. It's a large squad room with desks, file cabinets, telephones.

Q. Now, you mention a squad commander's office?

A. Right.

Q. Where is that in relation to the squad room proper?

A. As you walk through that little swinging door, it's to the left of the squad room.

Q. Now, after the defendant's brother had that brief conversation with the defendant by the bench in the squad room, what, if anything, happened with the defendant and Det. Dunn?

A. Det. Dunn escorted him into the Squad Commander's Office.

Q. And so who was present in the Squad Commander's Office at that time, sir?

A. The defendant, Det. Dunn, and myself.

Q. Did you close the door?

A. Yes.

Q. Describe the physical objects within that squad commander's room to His Honor, please.

[22] A. As you walk into the Squad Commander's Officer, there are two desks, they are back to back, whereas,

you sit at one desk, the other party is sitting at that desk. You would face each other. There are a couple of chairs; one was alongside the desk. There were filing cabinets, telephones, bulletin board.

Q. Det. Cullen, what position did you occupy in that room?

A. I sat at the first desk, which is to your right as you walk into the Squad Commander's Office.

Q. And where was the defendant?

A. The defendant sat alongside the desk.

Q. And where was Det. Dunn?

A. He was behind the defendant.

Q. Was he facing you, sir?

A. Yes.

(Continued on next page.)

[23] Q. And as you were seated at the desk and the defendant was seated alongside of you, Detective Cullen, did you have a conversation with this defendant?

A. Yes; I did.

Q. And from the very beginning, to the best of your recollection, tell this Court what you said to that defendant and what he said to you?

Mr. Adler: If your Honor pleases, I'm going to object to anything like this unless the defendant had been advised of his rights, that's prior to that time.

The Court: Suppose you wait until you get an answer. Go ahead, tell us what you said at that time.

A. At that time I advised the defendant of his right.

Q. From the beginning, tell us what you said to the defendant and what he said to you?

A. He had a right to remain silent. I asked him if he understood. He said yes. I told him anything he might say could be used against him in a court of law. I asked if he understood; he replied yes. I told him he could have an attorney; he had a right to an [24] attorney now, at any time in the future. I asked him if he understood; he said yes. I told him if he could not afford an attorney, one would be provided for him free of charge. I asked him if he understood. He said yes. I then asked him, having understood all of this, do you wish to make a statement? And he replied no.

Q. What did you then say?

A. I then asked him, "Well, would you care to tell me what you did on July 4th?"

Q. What did he say to that?

A. Yes.

Q. Now I want to go to that point, Detective Cullen, where you finished advising the defendant of his rights; and you said you informed the defendant that if he could not afford an attorney, one would be provided for him free of cost; and you asked him if he understood; and he replied yes. At that particular point, what if anything happened, with respect to the door of the Squad Commander's Room?

A. Oh yeah, Detective Dunn was—in around that time, he was called out of the office.

Q. And did Detective Dunn leave that office?

A. Yes, he did.

[25] [line missing]

finished advised this defendant of his rights?

A. Yes.

Q. And when he left the office was the door closed?

A. Yes.

Q. Now, Detective Cullen, you informed his Honor that you asked the defendant if he would be willing to tell you where he was on July 4th, and you indicated the defendant said he would. At that particular point did you ask any questions of this defendant?

A. Yes; I asked him if he was employed; and he told me he had been employed as a stock clerk in the garment center; but at that moment he wasn't working.

Q. What then did you ask?

A. May I refer to my record, your Honor?

The Court: Yes.

Mr. Adler: I take it that Detective Cullen is not able to testify to the question—to the question asked —answer to the question unless he refers to his notes. I would like the record to reflect that.

The Court: I think the record will show that the detective requested of the Court that he refresh his recollection.

[26] Mr. Adler: I understand, but I like to know whether he can do it without reading, without referring to his notes.

The Court: He's indicated that he needs to refer to his notes.

Q. Detective Cullen, did you take a rather lengthy statement from this defendant?

A. Yes.

Q. Did it occupy several pages in your memorandum book?

A. Yes.

Q. Have you committed those several pages to [illegible] memory, sir?

A. No.

Q. Detective Cullen, refreshing your recollection to notes, after the defendant informed you [illegible] used to work as a worker in the [illegible] shipping clerk, but was not working [illegible] what question did you then ask of [illegible].

Q. What response did he make?

A. He started to tell me what he did on July 4th.

Q. And tell his Honor what the defendant told you?

A. He said he left his house about 2:30, 3 o'clock that day and stopped at an after hours place and met [27]

some people who told him that there was nothing happening upstairs.

I then injected a question, and asked him, "Where is that?" He said, "158th Street, between Westchester Avenue—between 158th Street and Union Avenue."

And then he continued, "I then walked over to the garage to see my brother. When I got to the garage, I met my uncle, Rudolph Jackson. He told me my brother was not there. I talked with him and some other men about when I was pumping gas there on cold days. My uncle left; and I went to the back to get me a soda. When I got there there were two men drinking soda.

I then injected a question and asked him if he would describe the two men. And he proceeded to describe them. The first one he described as "Male Negro 20 to 21 years of age, thin face, jutting ears, five foot eight, 145 pounds, wearing a brown knit cap, beige zipper golf jacket, dark brown turtle-neck shirt, brown pants, low-cut playboy shoes, dark, with a buckle."

The second one he described as "Male Negro, 24 to 25, your Honor. I'm sorry, six foot to [28] six foot one, heavy set, about 175 pounds, medium complexion, moustache and goatee, black wavy hair, no hat, black zipper jacket closed, dungarees or blue pants, white low-cut tennis shoes."

Then he proceeded to say, "The first guy; and with that I injected again. I said, "He'll be number one." He said, "All right, number one had a soda and was opening it. Number two was getting his out of the machine. Then I got mine. I think it was Fresca. I don't know what the other two were drinking. I took my soda in the back to look for my brother's tool box. I didn't find it; and was looking at the picture on the wall, and just looking all around. There was a mechanic working on a cab. I told him I was Mike's brother; and they engaged in conversation."

I injected a question there, "What was the conversation?" "Just general talk, mechanical work, and things like that." So, therefore, I wrote down here, "Idle conversation."

Then he continues. "Then I said 'good night' and I went into the Dispatcher's Office to say good night to Sam. As I went through one door, going to the [illegible] door, I heard two shots. Then I went into the Dispatcher's Office and saw number one going through [29] the window; and I froze by the cigarette machine. Then number 2 came from outside where the gas pumps are; and number 1 started handing money to number two who was taking it and placing it in his jacket pockets, pants' pockets, and in his belt. Then number 1 came back out through the window and then picked up money from the inside in his arms. Then they ran; and then I ran.

And at this point I injected a question, and I asked him why did he run? And his reply was, "I was afraid I would get blamed. Then I went to Walton Avenue and started to walk left.

In my notes, your Honor, I indicated north in parenthesis, and half way up the block, and through the park; and came out on the Grand Concourse; [illegible] then went south to about 151st Street; and then west on 151st Street to the Melrose Project; walked through; then made it to 790 East 158th Street, my mother's house. But I didn't go up. I then went to the donut shop on Project Avenue, between 160th Street and Longwood Avenue; and stayed there about 20 minutes.

I just walked up to 163rd Street, over to Sutphin Boulevard. Then I walked around the area by myself. Then I injected a question again here. I asked him, [30] "Did you get wet in the rain? And his reply was, "What rain?" And I replied, "Oh, I thought it rained that night." And he replied, "I don't recall it rained." And then he went on,

"At about 10 a.m. I went over to Wayne and Gail's house; and I interjected a question there and asked him, "Where is that?" And he replied, "906 Gerard Avenue, Apartment 1-A. When I arrived, I woke them both up.

I asked, I injected a question here and asked him, "Who answered the door?" He said, "Wayne answered the door; and Gail remained in bed. Wayne let me in; and I sat on the couch; and I said to Wayne, "I think I'm in a little trouble," and said, "I'll discuss it with "him" later." He and Gail were sleeping in the living room and Wayne went and fixed me a couch in the bedroom. Then I laid down and was half awake and half asleep.

About 12:30 or 1, the defendant started to say "Gail" but corrected himself, and said, "Clair from upstairs came in and woke me up, and said, 'I hear you're in a little trouble.' And I said 'I don't want to discuss it'. Then we had general conversation. I asked him what they talked about at that time, just general conversation about trips they [31] were going to take to Bear Mountain, one thing or another over the whole day, weekend, or—

> Mr. Adler: Objection. I object to your talking a little too rapidly and not loud enough. Will you please raise your voice.
>
> The Witness: I'm sorry, counsel.
>
> Mr. Adler: All right.

A. At that time I asked him what the conversation was and he replied, "It was just general conversation; talking about the children she had and they were going to take a little trip over the July 4th weekend to Bear Mountain, something like that,"

So in my notes I wrote, "General conversation." I didn't indicate the whole thing. Then Wayne brought me in some breakfast and I asked him what he had. He had four fried eggs, bacon, biscuits and coffee.

Mr. Adler: Mr. Cantor, is this gentleman one of your witnesses?

Mr. Cantor: No. (Referring to a man who just entered the courtroom.)

Mr. Adler: All right.

A. Then Wayne and I left about 2:30 or 3 p.m., and went for a car ride in a car that Wayne's mother had rented for him. Wayne parked the car between 160th Street [32] and 161st Street and Tinton Avenue. Then I went up 160th Street to Union Avenue; made a right, and down to 158th Street. I walked back up Union Avenue and met Raymond; and while I was talking to Raymond, my brother came running up to me and said, 'Man, what's happening?' I replied, 'Nothing is happening.' And he said, "Sam is dead" and that I was the only one identified for being on the premises.

I said, "I was on the premises and I was there when it went on, but I didn't want to discuss it." Then he told me that the cops had broken down my door and had bullet-proof vests and guns and said that I was armed and dangerous and that really shook me up.

Then I told him I'll call you. At this point the defendant said, "And that's all." And then I asked him, "That's all? Did you care to tell me where you were between July 4th and the 8th?" And he said, "No, that's all I have to say."

Q. Now, Detective Cullen, at that particular point, did the defendant remain with you in the Squad Commander's Room after the conversation was concluded or did he—

A. No.

Q. Or did he go someplace else?

[33] A. No; we got up; we opened the door; we escorted him out; and then in all probability he was put into the detention cell in his—I don't recall exactly whether he remained outside the cell for any length of time.

Q. But he remained in the vicinity of the Squad Room and the Squad cell?

A. Yes; he was either in the squad room or detention cell in the squad room.

Q. Well, for approximately how long a period of time, Detective Cullen, would you say that your conversation with this defendant in the Squad Commanders Office lasted, approximately?

A. Well maybe 20 minutes to a half an hour.

Q. And to the best of your recollection, have you related to his Honor the entirety of the conversation had between you and the defendant?

A. Yes.

Q. Subsequent to that, Detective Cullen, did you have any other conversation with the defendant?

A. No.

(See next page)

[34] Did anyone else, in your presence, Detective Cullen, subsequent to your conversation, have any conversation with this defendant? Police officer?

A. I can't recall. I mean—

Mr. Adler: I object to anything further. He can't recall.

The Court: Yes.

Q. All right, Det. Cullen, let me refer you to July 7th, 1970. On that particular day, Sir, did you have occasion to go to the Bronx House of Detention?

A. Yes.

Q. Det. Cullen, do you know a man—

Mr. Cantor: I'll withdraw that.

Q. Did you know a man at that time by the name of Benny Lee?

A. Yes.

Q. And on July 7th, did you see Mr. Lee?

A. I did.

Q. And where did you see Mr. Lee?

A. At the Bronx House of Detention.

Q. And did you have a conversation with Mr. Lee at the Bronx House of Detention on that day?

A. I did.

Q. By the way, on July 7th, 1970 was Mr. Lee an [35] inmate of that institution?

A. Yes he was.

Q. Tell His Honor what you said to Mr. Lee.

Mr. Adler: I object to any connection with the defendant. No basis for it.

Mr. Cantor: I think I'll develop that basis, Your Honor, through the next witness that testifies at this hearing.

The Court: For the purpose of the hearing, objection overruled.

Mr. Adler: Exception.

Q. Please continue, Officer.

A. I told Mr. Lee that an arrest was imminent, of Joseph Allen Wilson, and I explained to him the situation for which he was being arrested, insomuch as there were three perpetrators who entered this cab dispatcher's office. I asked Mr. Lee if he would be willing to keep his ears open, not to inquire, or to question this defendant if he was put in the same cell with him, but more or less just to keep his ears open as to the other two perpetrators.

Q. And Det. Cullen, when you made that request of Mr. Lee, what was his response, Sir?

A. Yes, he would.

[36] Q. And did you inform Mr. Lee that you were, as you said, that an arrest was imminent of this defendant, did you inform Mr. Lee that you were going to make arrange-

ments to have this defendant, upon his arrest, placed in the same cell with Mr. Lee?

A. Yes, if it was agreeable with him.

Q. Did you have, on July 7th, when you visited Mr. Lee at the Bronx House of Detention, Sir, did you have a photograph of the defendant Joseph Allen Wilson with you?

A. Yes.

Q. Did you display that photograph to Mr. Lee?

A. Yes.

Q. And was that, Sir, to the best of your recollection, the extent of your conversation with Mr. Lee, at the Bronx House of Detention on July 7th?

A. Well, I told him I'd get back to him at another time.

Q. And was that the extent of your conversation?

A. Yes, that was it.

Q. And was that your first conversation with Mr. Lee, with respect to this case, Sir?

A. Yes.

Q. Now Det. Cullen, let me refer you to July 24th, 1970. On that day did you have occasion to again return [37] to the Bronx House of Detention?

A. I did.

Q. And without going into the content of any conversation, did you, on that day, have a conversation with Mr. Lee?

A. I did.

Q. And did there come a time, that your conversation on July 24th, 1970, in the Bronx House of Detention, was over with Mr. Lee?

A. Yes.

Q. Det. Cullen, going back to July 8th, 1970, at the 44th Squad, while you were present with this defendant, at any time, did either yourself of anyone in your presence ever use any abusive or foul language in front of this defendant?

A. No.

Q. Did either you or any police officer in your presence ever strike a blow at this defendant?

A. No.

Q. Were any threats made by either yourself or any one else, in your presence, to this defendant, on that day, Sir?

A. No.

Q. In fact, Det. Cullen, was there not some discussion [38] on July 8th, 1970, at the 44th Squad, about supplying this defendant with food and cigarettes?

A. Yes, his brother inquired could he get him something for his brother. I said, certainly.

Mr. Cantor: I have no further questions on direct, on this Huntley hearing of this witness, Your Honor, and I will make a representation to the Court that the witness, Benny Lee, as to which Your Honor took certain testimony, will be produced by the People, as the next witness in this hearing.

Mr. Adler: Judge, may I ask for about ten minutes' recess? I'd like to ask to examine the document, or that was, the book, the detective testified from.

The Court: His memo book?

Mr. Adler: His memo book. Yes.

The Court: Mark it for identification, please. Pages—

The Witness: There is additional notes here, Your Honor, which are xeroxed copies.

The Court: There are?

The Witness: Yes.

The Court: All right. So that, mark that for identification, and then turn it over to counsel.

[39] We will take a short recess. You may step down in the meanwhile, and the defendant is returned upstairs during the recess.

Mr. Cantor: Received and marked for identification, People's Exhibit #1 for identification.

The Court: Unless counsel objects [illegible] for identification. And if there is [illegible] in your mind, you can compare it with [illegible]

(At this time the notes were received and marked People's Exhibit #1 for identification.)

(At this time the defendant was remanded and the court stood in recess for ten minutes.)

• • •

[40] Court Clerk: People of the State of New York against Joseph Allen Wilson. People, defense counsel and defendant are present.

DETECTIVE WALTER J. CULLEN, previously been sworn, resumed the stand and continued testifying as follows:

Cross-examination by Mr. Adler:

Q. Detective Cullen, was Detective Dunn there with you at all times?

A. No.

Q. Was he in there some of the time?

A. Yes.

Q. And was that at the time he first gave himself up on July 8, 1970?

A. Yes.

Q. Now, did Detective Dunn make any notes, do you know?

A. In relation to what, Counselor?

Q. In relation to any conversations or anything that occurred when you were present?

Mr. Cantor: On what date?

Q. On July 8th?

A. Well, yes, he made, I'm certain he made notations [41] on July 8th, yes.

Q. And he made notations in his memorandum book would you say?

A. Yes.

Q. Where is Detective Dunn now?

A. He's in Mr. Cantor's office.

Q. Now who did the questioning, Mr. Dunn participate in that?

A. Counselor, are you talking to—

Q. I'm talking now at all times of July 8th. Did you—

A. Are you talking about specifically when I was having a conversation with the defendant?

A. Yes, that's right.

A. No, he didn't take any notes at that time.

Q. And was the Chief of Detectives in the room with you?

A. No.

Q. This was a murder case?

A. Yes.

Q. And you had no one else in the room with you to corroborate anything that was said?

Mr. Cantor: I object to the form.
The Court: Objection sustained.

[42] Q. Did you think it important to have anybody with you at the time you questioned this—

Mr. Cantor: Objection, your Honor.
The Court: Sustained.

Q. Now you have certain notations on this paper and I'll indicate them to you and ask you where you put 1, 2, 3, 4 and 4A and so forth, what did that indicate?

A. That indicated where I interposed a question to the defendant.

The Court: For the record that reference is to—
Mr. Cantor: People's 1A for identification.
The Court: 1A for identification.
Court Clerk: One.
Mr. Cantor: One, I don't think they broke it up.
The Court: Yes, one for identification.

Q. Now when did you make those notations, 1, 2, 3, 4, 4a and et cetera, with regards to the numbers, small numbers and circles, when did you do that?

A. I did this within this week after reviewing it with Mr. Cantor.

Q. And when did you write the questions on the [43] foot of that memorandum sheet? Was that also [illegibile] the same time?

A. Yes.

Q. So that for a period of approximately twenty-one months there was nothing on the paper other than photostats with the exception of your writing; is that correct?

A. The photostats didn't exist for that period of time, Counselor.

Q. Now, but I'm talking about the notations that are on the photostats?

A. Yes.

Q. In ink?

A. Yes.

Q. Those were recently put on, that is within the last two weeks?

A. Yes, they were.

Q. And you made up those questions by refreshing your recollection from the notes that you made?

A. Yes.

Q. Now when did you transcribe these notes, the entire notes?

Mr. Cantor: No testimony of any transcription, Judge.

[44] The Court: Sustained.

Q. Well, when did you write them in your memorandum book?

A. On July 8, 1970.

Q. And was the defendant present when you were writing?

A. Yes.

Q. And you wrote in his presence?

A. Yes.

Q. As he was talking to you?

A. Yes.

Q. And he say you do that?

Mr. Cantor: I'm going to object. How could he say what the other man was looking at?

The Court: Objection sustained.

Q. Well, how far was he away from you when you were writing?

A. Two feet, three feet.

Q. Now when you first encountered him or when he first presented himself to you, you asked him did you [illegibile] "Do you want to make a statement?" Is that what you asked him?

A. I had to ask that question of him, yes.

Q. And did he say, no, he didn't want to make any [45] statement?

A. Yes.

Q. And thereafter you had him make a statement; isn't that correct?

A. I didn't have him make a statement; he made it.

Q. You asked him to make a statement; did you not?

A. I asked him if he cared to tell me what he did on July 4th.

Q. And there was no lawyer present when he made that statement?

A. No, there was not.

Q. And it was after he had refused to make a statement that you had again requested him to do so; isn't that so?

Mr. Cantor: I'm going to object, Judge.

The Court: Objection sustanied as to form. It's argumentative.

Q. Well, after he had refused to make a statement you then questioned him further; isn't that right?

A. Yes.

Q. And there was no lawyer present at that time?

A. No.

Q. And there came a time when the Assistant District Attorney from the Bronx District Attorney's Office [46] came up to the precinct; is that correct?

Mr. Cantor: I'm going to object since this post-dates any conversation between this defendant and the officers, Judge, it's entirely irrelevant.

Mr. Adler: Well, the same night, the same day—

The Court: Objection sustained.

Mr. Adler: May I repeat the question for the record, Your Honor, please.

Q. Did there come a time on July 8th in the precinct at which time you and the defendant were present? Did there come a time on that day some hours after you had first met the defendant that the District Attorney's Office was represented by one of its Assistants with a stenographer?

Mr. Cantor: Same objection.

The Court: Same ruling. Sustained.

Mr. Adler: Exception.

Q. How long was the defendant in the precinct when he was placed under arrest?

A. How long was he in the precinct?

Q. That's right.

A. He was placed under arrest as soon as he arrived.

Q. And how long after he arrived did he make this [47] statement to you or did he—did you have this conversation for which you took the notes which you have used to refresh your recollection?

A. About ten, fifteen minutes.

Q. Well, now, did you fingerprint him?

A. Did I?

Q. Yes.

A. No. I answered, no, Counselor.

Q. Oh, I'm sorry, I didn't hear you. You did not. And how long after he was in the precinct was he fingerprinted?

A. I didn't fingerprint him.

Q. Well, after he was placed—how long was he in precinct when he was placed under arrest.

A. He was placed under arrest immediately.

Q. Well, now did you know that he was fingerprinted?

A. Yes.

Q. How long after he was placed under arrest was he fingerprinted?

A. I can't recall.

Q. Well, would you say it was an hour?

Mr. Cantor: Judge, I'm going to object to everything that post-dates the statements. It's irrelevant to the voluntariness of the statements.

[48] The Court: Sustained.

Q. Well, was he fingerprinted before or after he made this conversation with you?

A. To the best of my recollection he was fingerprinted after.

Q. And how long had you spent with him in making these—in this conversation?

A. Twenty minutes to a half hour.

Q. Now isn't the procedure of the police department to fingerprint a man the minute he's arrested?

Mr. Cantor: Objection, Your Honor.

The Court: Sustained.

Mr. Adler: Exception.

Q. Did you make any notes of any conversation with others with respect to what you testified to this morning?

Mr. Cantor: I'm going to object. It's only this statement of this defendant that's in issue.

The Court: Sustained.

Mr. Adler: I'd just like to know, Your Honor, on the question of credibility whether this man has made any notations or memoranda with respect to any conversations relating—with others relating to what he testified to this morning.

[49] The Court: We understand your application and the objection is sustained.

Mr. Adler: May I have an exception, Your Honor, please?

Q. The fact is, though, Detective Cullen, he never admitted committing any crime; isn't that so?

Mr. Cantor: Calls for a conclusion.

Q. To you?

The Court: That's a conclusion, sustained.

Q. Did he ever make any admission of committing a crime to you?

Selected Hearing Testimony of Detective Walter Cullen

Mr. Cantor: Same objection.
The Court: Sustained.

Q. Were there any statements made to you with respect to the commission of any crime?

Mr. Cantor: Calls for a characterization, Judge.
The Court: Sustained.
Mr. Adler: Exception.
(Counselor Adler conferred off the record with the defendant.)

Q. All these notes that you have in your memorandum, they were made in your own handwriting; is that correct?
A. Yes.
[50] Q. No one else wrote them down or made any additions or modifications to it?
A. No.

(Counselor Adler conferred off the record with the defendant.)
Mr. Adler: No further questions of this witness.
The Court: You may step down at this time. You have no questions, have you, Mr. Cantor?
Mr. Cantor: No.
The Court: All right, we'll resume at 2:15. Remand the defendant in the meanwhile.

(Luncheon Recess.)

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Hearing Testimony of Benny Lee

[52] Mr. Cantor: If your Honor please, continuing on the Huntley hearing, the People call Benny Lee to the stand.

BENNY LEE, an inmate of Greenhaven Prison, New York State, having been called as a witness by and on behalf of the People, was duly sworn and testified as follows:

The Court: Is that Benny?
Court Officer: B-e-n-n-y, sir. Lee, Capital L-e-e.

Direct examination by Mr. Cantor:

Q. Mr. Lee, I'd like to refer you to July 7th, 1970. On that particular date, were you in the Bronx House of Detention as an inmate?
A. Yes, sir.
Q. Do you know a Detective Walter Cullen?
A. Yes, sir.
Q. On that particular date, at the Bronx House of Detention, did you have a discussion with Detective Cullen?
[53] A. Yes, sir.
Q. Tell his Honor, Mr. Lee, what Detective Cullen said to you and what you reply was.
A. Detective Cullen told me that he was investigating a murder and a robbery. And he showed me a photograph.
Q. Photograph of whom, sir?
A. Of Wilson, Mr. Wilson.
Q. Do you see Wilson here in court today, the man you refer to by the name of Wilson?
A. Yes.
Q. Point him out.
A. (Indicating).

Mr. Cantor: Let the record indicate the witness has indicated the defendant.

Q. Please continue. What did Detective Cullen tell you?

A. Detective Cullen told me he was investigating a murder.

The Court: Keep your voice up, if you will, please.

(Continuing) And that he had a suspect in the murder case.

Mr. Adler: I can't hear. I'm sorry.

The Court: Would you keep your voice up, please [54] I'm having difficulty, and I'm sure counsel is.

Q. Speak to me. I'll stand back here. All right?

A. Yes.

Q. Detective Cullen said that he had a suspect in a murder case?

A. Yes.

Q. And he showed you a picture of the defendant, Wilson; is that correct?

A. Yes, sir.

Q. All right. And what did he tell you, sir?

A. He wanted to know if I knew him, and he wanted to know if there was anything that I knew about it or anything that I could do to help him with the case.

Q. Did Detective Cullen inform you that he was about to make an arrest in that case that he mentioned?

A. Yes. He said he knew who one man was.

Q. Was that the man whose picture he showed you?

A. Yes, sir.

Q. And did Detective Cullen tell you what he was going to do with that man with respect to making arrangements, once he arrested him?

A. Yes. He said he was going— he was pretty sure he would make an arrest within twenty-four hours, and that he would have the man put into my cell in Bronx House of [55] Detention.

Q. Did Detective Cullen request something of you, ask you to do something?

A. Yes, he did.

Q. What was that?

A. He asked me to listen to the man and to find out, if I could, who were the other two men that were with him.

Q. Did Detective Cullen tell you what he did not want you to do when this man was put in your cell?

A. He said he didn't want me to ask questions or question the man in any way, just to sit there and to listen to him and to see if I could find out the names of the other two men who were involved.

Q. Did you agree to Detective Cullen's request?

A. Yes, sir.

Q. Now, Mr. Lee, when were you arrested on your case and placed in the Bronx House of Detention?

A. On June 24th— 25th.

Q. And did there come a time, after you were arrested and placed in the Bronx House of Detention that your cell was changed up to the sixth floor?

A. Yes, I was on one floor, and they moved me up to Six-South.

Q. And when you moved up to the Six-South floor, [56] and you occupied a cell, when you first came into that cell, were you alone, or did you have a cellmate?

A. No, sir, I was alone.

Q. And for how long a period of time did you remain alone in that cell?

A. Approximately two weeks.

Q. And did there come a time, after two weeks, that you got a cellmate?

A. Yes, sir.

Q. And who was that cellmate, sir?

A. Mr. Wilson.

Q. And do you remember about one o'clock on that day, when you saw Wilson come into your cell as a cellmate, that there was a conversation, that Wilson said something to you about one o'clock that afternoon when he came in?

A. Yes, he did.

Q. That was the first day that he was your cellmate?

A. Yes.

Q. Tell the Judge what Wilson said.

A. He came in about one o'clock. It was after lunch. And he was very upset about being moved up to the sixth floor. The garage at which the crime was committed faces [57] that part of the Bronx County, and you can look right from my window, from the window right down in [illegible] garage.

Q. You can see that garage on [illegible] window in your cell?

A. Yes, sir.

Q. So he was upset about that?

A. Yes.

Q. And did he start speaking?

A. Yes, he spoke to me. And he said that he had been accused of a robbery and a murder at this garage [illegible] facing us, and he was upset about the fact that [illegible] moved from one cell upstairs to another that faced the garage.

Q. And what did he say about the robbery and the murder?

A. He told me that he was accused of this robbery and murder at the place where he formerly worked, and he knew everybody there, and his brother and his uncle also worked in the place. And then he went on to say that on the night of the crime, he went to— he went over there to see his brother, and he met two men outside of the place and the two men asked him— one of the men asked him did he have— did they have a soda machine [58] inside and he

told the men yes, they had a soda machine and he directed them to a soda machine. After the [illegible] went inside, he followed them inside and was [illegible] one of the men that worked there that knew him [illegible] ing there. He heard a loud— loud report, and he saw the two men running from the office [illegible] was putting money in his pockets —both men were [illegible] money in their pockets and dropping money on the [illegible]. So he walked over and he picked up some of the money [illegible] the two men had gotten, by this time, outside and they [illegible] running away. He picked up some of the money and followed the two men outside, and he was looking in the direction that the two men were running. Then he walked away from the— from the place.

Q. Now, after he told you that, what did you respond, if anything, to the defendant?

A. I think I remember telling him that the story wasn't— it didn't sound too good. Things didn't look good for him.

Q. And what was his response to that?

A. Well, he didn't say anything, but he stuck to the story. He didn't change anything. And he said that was it, that's what happened.

Q. Now, prior to his telling you this story, [59] Mr. Lee, did you in any way question this defendant?

A. No, sir.

Q. Did you put any questions to him whatever?

A. No, sir.

Q. For how long a period of time, Mr. Lee, [illegible] in that cell with this defendant, Joseph Allen Wilson?

A. About a week or ten days.

Q. Now, passing on to the balance of the time you were in that cell with him— You have told us he gave you a story on the first day. During the [illegible] of that time, did the defendant make other statements to you?

A. Yes, he did.

Q. Now, these other statements, Mr. Lee, at any time during the course of the period that this defendant made other statements to you, did you at any time put questions or inquiries to him?

A. No, sir.

Q. Now, there came a time that you got a second story from this defendant; is that correct?

A. Yes, sir.

Q. About how many days passed from the first day until the time that you had that second story from him?

A. Oh, just about two or three days.

[60] Q. Now, tell his Honor what this defendant [illegible] you within the next two days.

A. Within the next two days, the story changed [illegible] bit. Then he said, in regards to the two men did know the two men, and that he had planned [illegible] with the two men and— he had planned the robbery [illegible] the two men. He had planned it. He knew the layout of the place and he thought it would be an easy touch [illegible] weekend.

Q. Well, did he tell you anything else about the facts of the crime?

A. Yes, he went on— He told me about— He went inside at first to case the place, to look and see if everything was all right. Then he went back outside and told the two men that everything was cool, that they could take the place off with no trouble. The three of them came back inside, stopped at the soda machine, had sodas, looked around some more, and went to the office and "We shot the man."

Q. Is that his term. "We shot the man"?

A. Yes, sir.

Q. And after he said, "We shot the man," what then did he say?

A. "We picked up the money and left."

[61] Q. And did he tell you by what way, by what [illegible] he took when he left?

A. Yes, sir. They went through the park and took [illegible] on the other side of the park. They did stop in the park for, oh, to get the money together or something and then they— on the other side of that little park they took a cab on Grand Concourse to I think it was Tinton Avenue and 165th Street.

Q. And did he tell you where he was while the police were investigating this crime?

A. Yes. He told me that the police came to his house the next morning, broke down his door and scared everybody in the neighborhood, sealed off the whole building, scared everybody in the neighborhood, and they couldn't find him, that he was hiding right under their noses all the time.

Q. And did he tell you anything about his arrest, about his arrest by the police?

A. Yes. He said that when he found out the police were looking for him, he got pretty scared and decided to turn himself in.

(Continued on the following page.)

[62] Q. Was he afraid of what might happen if the police found him?

A. Yes he was afraid that the police would kill him because of the manner in which they came and—[illegible] arrest him, that is.

Q. Now, Mr. Lee, during the course of this second story that the defendant gave to you, you testified that you did not question the defendant, tell his Honor how this defendant came about telling you that second story during that two or three day period after the first day that you were together in the cell.

Mr. Adler: That's objected to if your Honor pleases.

The Court: Objection overruled.

A. The defendant had a visit from his brother.

The Court: Beg pardon? I didn't hear that.

The Witness: A visit from his brother.

The Court: All right.

The Witness: And he was upset over the fact that his brother had come and said that his family was saying that he had killed Sam and why did he kill Sam and this upset him very much and that would start him to talking about different things, about the crime and different things.

[63] Q. And once he talked about the fact that his family was upset that Sam had been killed?

A. Yes.

Q. Did that lead him into the second story?

A. Yes.

Mr. Adler: I object to the leading.

The Court: Sustained. Don't lead.

Q. In any event, during the nine or ten day period that you were together in the same cell with this defendant, Mr. Lee, did you at any time press inquiries or questions to this defendant to uncover any information?

A. No, sir.

Q. At all times all of the things that you've related to his Honor here today in court, were those the statements that were initiated by this defendant Joseph Allen Wilson to you while you were in that cell?

A. Yes, sir.

Mr. Cantor: I have no further questions on direct examination.

Cross-examination by Mr. Adler:

Q. Mr. Lee, what's your business or occupation?

A. Oh, I'm a bricklayer.

Q. And are you in custody of the police now?

[64] A. No, sir.

Q. Did you make a deal with the police?

A. No, sir.

Q. Did you know Detective Cullen before he came before he visited you?

A. Yes, sir.

Q. What were you charged with?

A. Robbery.

Q. First degree?

A. Third degree.

Q. Third degree. Did you have a weapon?

A. Yes, sir.

Q. Did you have any previous conviction?

A. Yes.

Q. What was that?

A. Once for robbery.

Q. Anything else?

A. Unlawful entry.

Q. Did you have another one?

A. I've several of them all together.

Q. Now, did you have any discussions with Detective Cullen before he came to see you?

Mr. Cantor: When is this, Judge; are we discussing July 7th?

[65] Mr. Adler: July 7th.

Mr. Cantor: The question is did he see Cullen prior to July 7th?

Mr. Adler: That's right.

The Court: That's the question.

Mr. Cantor: I object, Judge; I'm going to make a concession here that this man was an agent of the

police admittedly. I don't deny that for a moment so anything that transpires prior to 7th is irrelevant.

The Court: Do I understand you to say your position is this man was an agent of the police.

Mr. Cantor: Exactly, Judge. I concede that.

Mr. Adler: Very good.

The Court: All right.

Q. When he spoke to you, did you warn him of his rights?

The Court: Mr. Adler; he's not a police official.

Mr. Adler: I understand that but he's an agent of the police.

Mr. Cantor: I'll concede that Judge for the purposes of the record there were no Miranda warnings. No Miranda warnings.

Q. Did you ever tell him you were working for the police?

[66] A. No, sir.

Q. Just had him talk to you?

Mr. Cantor: Objection to the form of that question your honor.

The Court: Sustained as to form.

Q. Well, did you talk it over with Detective Cullen as to taking any notes of your discussion?

A. Talked it over with him?

Q. Yes. Withdrawn. Did you make any notes of what your discussion with the defendant was?

A. Yes, I did.

Q. Where did you do that?

A. Where did I do it?

Q. Yeah.

A. Oh, in Bronx County.

Q. What's that sir?

A. In Bronx County.

Q. Do you have those notes with you?

Mr. Cantor: I have a copy of them, Judge.

Mr. Adler: May I see them?

Mr. Cantor: May we have them marked for identification?

The Court: Would you like them counselor?

Mr. Adler: I'd like to see.

[67] The Court: Mark them for identification, show them to counsel please.

Mr. Cantor: That would be People's 2, Judge and it's only one side of People's 2.

The Court: For identification.

Court Officer: People's 2 marked for identification.

[One side of paper marked for Identification.]

Q. I show you this paper and I ask you, is this in your handwriting?

A. Yes.

Q. Can you read it?

A. Yes, sir.

Q. Now, did you hand that to the police, to Detective Cullen?

A. Yes I did.

Q. And where did you hand that to him?

A. On the second time he came; second time I saw him.

Q. And how long after July 7th 1970 was that?

A. It was about three weeks, three and a half weeks maybe.

Q. And were you promised any leniency if you cooperated with the district attorney?

A. No, sir.

[68] Q. You just did this voluntarily?
A. Yes, sir.
Q. As a citizen, a good citizen?

Mr. Cantor: Objection to the form, Judge.
The Court: Sustained as to form.
Mr. Adler: May I have that please?

Q. Now, would you tell us in substance what's written on here? I can't read it Judge, that's the only reason.

Mr. Cantor: I'm going to object.
Mr. Adler: I'll let your Honor see it.
The Court: It's not in evidence but perhaps the witness may be able to read it since they are his notes I believe.

Q. Where did you write this?
A. Where did I write it?
Q. Yeah, People's Exhibit 2 for identification?
A. I wrote it over a period of days. Those are just notations that I made.
Q. And you didn't write them in the cell, did you?
A. Some of them.
Q. Where was the defendant when you wrote those?
A. He was there.
Q. You wrote them, he saw you write those?
A. Yes. Of course.

[69] Mr. Cantor: Objection. How can he testify as to what the man saw; he only has his own eyes.
The Court: Yes.

Q. How far away was he when you wrote this?
A. In jail people mind their business. [Illegible] eyes—
Q. I didn't ask you that. How far was he [illegible]?
A. Maybe three feet.

Q. Did you tell him you were making any notes about him?
A. No.
Q. Did you plead guilty to your robbery charge?
A. Yes.
Q. Were you sentenced?
A. Yes, sir.
Q. Given a suspended sentence?
A. No, sir.
Q. How much time were you given?
A. Four years.
Q. How much time—are you in prison now?
A. Yes.
Q. Incidentally, were you given any drugs while you were in jail?
A. No, sir.
[70] Q. Were you addicted at any time?
A. Yes, sir.
Q. Now, did you talk it over with Detective Cullen before you came here today?
A. No, sir.
Q. You talk it over with Mr. Cantor before you came here today?
A. Yes, just briefly.
Q. How long ago?
A. Well, yesterday.
Q. Yesterday?
A. Yes.
Q. And before that, did you speak to Mr. Cantor about it?
A. No, sir.
Q. You speak to any member of the district attorney's office?
A. No, sir.
Q. About this case?
A. No, sir.

Q. And when did you last speak to Detective Cullen about it?

A. Oh, about two years ago.

Q. And since that time did you discuss it with him?

[71] A. No, sir.

Q. Did you discuss it with him today?

A. No, sir.

Q. Yesterday?

A. No, sir.

Q. Did you discuss it with any member of the police force within the last 48 hours?

A. No, sir.

Q. And within the last two years?

A. No, sir.

Mr. Adler: All right, I have no further questions.

Redirect examination by Mr. Cantor:

Q. Now, Mr. Lee, when Detective Cullen came back on July 24th, did you discuss what this defendant had told you and tell that to Detective Cullen?

Mr. Adler: I object to that, your Honor. He said he didn't discuss it.

Mr. Cantor: No, there is a point that I want to pursue and explain that's been delved into on cross-examination and that is his discussions with various members of the Police Department.

The Court: Overruled.

[72] Mr. Adler: Exception, your Honor.

Q. Did you on July 24th when Detective Cullen back to the Bronx House of Detention tell Detective Cullen what this defendant had told you?

A. Yes. I thought I said that before that Detective Cullen was back and I gave him the slip.

Q. And Mr. Lee, aside from yesterday when you and I spoke briefly about his case, approximately ten days ago—

A. Yes.

Q. Did you and I have a discussion in my office?

A. Yes, sir. When I came down from Greenhaven.

Q. And when you and I had this discussion in my office about ten days ago when you came down from Greenhaven did you tell me what this defendant told you in that cell?

A. Oh, yes, sir.

Mr. Cantor: I have no further questions.

Recross-examination by Mr. Adler:

Q. Well, now, that was ten days ago? Isn't that right?

A. Yes.

Q. You remember my asking you a few minutes ago, did you last speak to the district attorney, you said only [73] yesterday?

Mr. Cantor: I'm going to object.

A. Yes I did say that Judge. I was—

The Court: Just a moment please. Objection is sustained as to form of the question. That's argumentative.

Mr. Cantor: Can we strike the answer, your Honor?

The Court: Strike the answer if any.

Q. Well, then you did speak to the district attorney ten days ago?

A. Yes, sir.

Q. Did you forget that when I asked you the question?

Mr. Cantor: Objection.

The Court: Please don't argue with the witness, counsel.

Mr. Adler: Except as a matter of credibility, Judge, I'd like to test it.

The Court: I understand that very well but please don't argue with the witness.

Mr. Adler: Very good; I'm sorry, sir.

Q. Well, did you forget when I asked you the question, when did you last see the district attorney office?

[74] Mr. Cantor: Objection your Honor.

The Court: Well it's established that he spoke to the District Attorney within the last ten days is it?

Mr. Cantor: He's testified twice, ten days and yesterday.

The Court: Take it on from there.

Mr. Adler: This is the second time Judge he did it and I just want to—

The Court: Counsel, I'm following your cross examination very closely.

Mr. Adler: Thank you, Judge.

Q. Just to clarify in my own mind, between—in the last 20 odd months, you never discuss this case with anybody?

Mr. Cantor: I'm going to object unless the question incorporates the reference from July the 7th—July 24th, the last time the witness spoke to Detective Cullen until two weeks ago when he first spoke to me.

Mr. Adler: Very good, I will take that.

The Court: Rephrase it.

Q. From July 7th 1970—

Mr. Cantor: 24th.

[75] Q. Or July 24th, 1970, until approximately two weeks ago, did you discuss this case with anyone?

A. No, sir.

Q. Did you use any papers to refresh your recollection about what was said within the last two weeks, as to what you had discussed with Detective Cullen and with the defendant?

A. Did I use any papers?

Q. Did you use anything to refresh your recollect—did you read any papers?

Mr. Cantor: It's improper recross, Judge. I never touched on the redirect.

The Court: Oh, I'll permit it.

A. Did I read any papers?

Q. That's right. To remind you of what was said by him?

A. No, sir, no.

Q. Just relied on your own memory?

A. Yes.

Mr. Adler: No further questions.

Redirect examination by Mr. Cantor:

Q. Now, when you came down and when you spoke to me at approximately 10 days ago, Mr. Lee, did I show you [75a] People's number 2 for identification?

A. Yes.

[76] Q. And did you inform me that that was your notes?

A. Yes, sir; I did.

Mr. Cantor: No further questions.

Mr. Adler: No further questions.

The Court: You may step down.

(Witness complies.)

Hearing Testimony of Benny Lee

Mr. Cantor: If your Honor please, that concludes the People's Case on the Huntley hearing.

The Court: All right.

Mr. Adler: Your Honor please, I would like to move to dismiss on the ground, that is to vacate any statements which may be brought in evidence from the witnesses on the grounds that there appears that this was some influence which is beyond the permissive rights in that the defendant did, when he first apprehend—was apprehended, when he gave himself up to the Detective Cullen, he did refuse to make any statement; and then was further questioned.

Mr. Cantor: Judge—

Mr. Adler: —without counsel.

The Court: May I interrupt, counsellor?

Mr. Adler: Yes.

The Court: Will counsel step to the bench.

[77] Mr. Adler: Yes.

(Whereupon Assistant District Attorney Cantor and Counsellor Adler approach the bench and confer with the Court off the record and out of the hearing of the defendant.)

Mr. Adler: I rest.

The Court: As far as—

Mr. Adler: As far as the hearing on the Huntley Hearing is concerned.

Mr. Cantor: The People rest, Judge.

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Arguments of Counsel at Hearing

[79] Mr. Cantor: If your Honor pleases, the People concede that the witness Benny Lee was a police agent and was a cell mate of this defendant's.

I think the evidence is controverted that Benny Lee was instructed by the police to physically remain in that cell, but not take any overt action, and not take any steps, and not question or pose any inquiries; and Mr. Lee, of course, testified in an uncontroverted fashion that he followed the police mandates and that he did not question, and that he did not pose inquiries. He merely stayed in that cell. It would be as if a tape recorder were in that cell; and he absorbed, without questioning, he absorbed statements made by this defendant, initiated by this defendant, in a spontaneous, gratuitous fashion.

Now, as this Court is well aware in the case of People versus Mirenda, the Court of Appeals condemned statements made by a defendant to a cellmate, where that cellmate intentionally elicits or induces [80] statements and to quote the language of Mirenda, "Statements made by a cellmate to another, deliberately placed in proximity to the defendant in order to get statements, in order to get statements, or in the words of the Supreme Court of the United States in Messiah versus the United States, in which the Supreme Court of the United States condemned the efforts of a police agent who deliberately elicited or induced statement from a defendant; and the police action in that case, through the person of the agent, was deemed to be an abridgment of the defendant's constitutional rights."

The distinguishing characteristic in this case, Judge, in this case is more in harmony with People

versus Kaye and People versus McKee, Court of Appeals of this State.

The Court: Post or prior to Miranda?

Mr. Cantor: Post Miranda, post Miranda.

The Court: I'm talking about the Supreme Court, Miranda, not Mirenda.

Mr. Cantor: Miranda, yes, Arizona versus Miranda, these two cases—People versus Kaye and People versus McKee in 25 New York Second; and [81] the date of those cases are 1969, Judge, which indeed, post-Miranda.

The Court: All right.

Mr. Cantor: In any event, those cases turn upon spontaneous, gratuitous statements made by a defendant, all be it, the defendant is in a custodial setup.

The Court: Yes.

Mr. Cantor: —whether in a police station or whether it is in a jail, custodial is custodial. The fact that one defendant is in a jail and another is in a police station; or another is on a street corner being questioned by police, if the situation is custodial, the Court of Appeals, and indeed, the Supreme Court has condemned any statements made by a defendant to either the police or agent of a police with one, judge, one exception; and we have that exception, uncontroverted in this case.

The Court: May I interrupt you, one point further?

Mr. Cantor: Yes.

The Court: Those two cases cited, are they prior to Mirenda?

[82] Mr. Cantor: They're post Mirenda.

The Court: Post Mirenda.

Mr. Cantor: Post Mirenda. Mirenda, if your Honor please, was reported in 23 N.Y.2d People

versus Kaye and People versus McKee in 25 N.Y.2d Judge.

If your Honor will allow me, if I may read language from People versus McKee, and I'll quote the decision of the Court, and this is a situation, Judge, where the defendant in People versus Kaye—

The Court: Page?

Mr. Cantor: Well, it's at page 144, Judge. This is a situation where the defendant had been arrested by the police.

The Court: Yes.

Mr. Cantor: He had been surrendered by his attorney and the attorney unequivocally informed the police that it was the attorney's wishes that the police not interrogate and not question that defendant.

The Court: Yes.

Mr. Cantor: Whereupon the defendant was arrested by the two officers and taken to a car; and in the car he was driven to the police station. [83] Now, on the way, Judge, in that car, in the presence of the two police officers, the defendant began initiating a conversation, during the course of which the officers interposed questions as to [illegible] als, time, and place and whereabouts.

The Court of appeals said as follows: "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."

"There is no requirement that the police stop a person who enters a police station and states he wishes to confess to a crime, or a person who calls the police to offer a confession, or any other statement he desires to make; volunteered statements of any kind are not barred by the fifth amendment, and

their admissibility is not affected by our holding today."

Judge, the Court of Appeals recognized in this case, People versus Kaye, that the defendant was in custodial interrogation; he was in a custodial setting, I should say he had already been arrested. His lawyer had already advised the police not—not to question the defendant; the defendant initiated the conversation; and the officers—much more [84] grivous situation than we have here with Benny Lee, the officers then propounded a series of incidental questions; and notwithstanding that, the Court of Appeals held that the defendant insisted on talking." This is a quote. "And the detectives requested that the defendant start from the beginning, if he wanted to tell his story; does not constitute custodial interrogation within the meaning of People, of Miranda versus Arizona.

The key distinction, Judge, and the distinction that I'm hoping to impress this Court with is that Benny Lee was not only instructed not to initiate the conversations, but Benny Lee lived up to that instruction; and if it will please your Honor, I would submit that Benny Lee was nothing more, your Honor, than an individual who stood there or sat there or remained in that cell with this defendant; and this defendant, for reasons best known to him, whether he wanted to unburden his soul or for whatever reasons, we've had testimony of the fact that the cell overlooked the garage where the crime was committed, and this was sort of a catalytic agent, according to Benny Lee's testimony that started the defendant's spontaneous [85] talking; and it was self compelling and gratuitous.

The point being, Judge, that this defendant initiated, volunteered spontaneous statement, and that exception has survived People versus—I should say Arizona versus Miranda; and the United States versus Escobito; and that exception still exists in our case law today, that a man can always, to the police, at any time, spontaneously for whatever reason motivates him in his own mind, can always come forth and make statements; and if there is no State action, if there is no inquiry, if there is no questioning, if there is no interrogation by either the agent of the police or by the police, those statements gratuitously offered by a defendant is admissible.

That brings me to People versus McKee, also a post-Miranda case and a post Mirenda case, New York Court of Appeals.

And this was the situation where an individual was a suspect in a murder case. He had been called in. He had been questioned, I believe, and he was aware of the fact that he was a suspect in a murder case and he was represented by an attorney and the attorney informed the police in that case that the [86] police would have had nothing more to do with his client, and that the police should not pursue the matter any further.

However, one day on the street, there was a coincidental meeting between the police and the defendant in People versus McKee, and at that particular time the police baited this defendant by telling him that "You're not dealing with an old lady now," referring to the deceased in that case, ". . . that you're dealing with grown men."

And at that particular time there was a street conversation and the defendant blurted out the admission, this is a quote, the defendant blurted out

the admission, "I did it, but you guys can't prove it."

The Court goes on to note that significantly it was the defendant who initiated the verbal dual. We have a dual in this case—in our case we have no dual. It is entirely unilateral. Benny Lee is saying nothing. This defendant is doing all of the questioning.

The Court goes on to say in People versus McKee "It was the defendant who commenced the verbal attack upon Patrolman Monroe; and it may be [87] fairly said that the admission which resulted from the argument was the product of the defendant's own bravado.

Well, in the McKee case we have a boastful defendant, showing his bravado. In this case, the Wilson case, we have a man, either so unnerved by the sight of the garage, out of the window of the cell, that he goes on and it spurs him on, and it's a catalytic agent—was so unnerved by the fact that he's transferred for no apparent reason to the cell on the sixth floor from his previous cell, both of which reasons were testified to in uncontroverted fashion by that witness Benny Lee—in any event there's an unburdening of facts in this defendant's ken of knowledge to Mr. Benny Lee; and Benny Lee is not even involved in a dual. Benny Lee is not even interposing incidental questions as he did in the Kaye case.

Lastly, Judge, it takes me to Supreme Court of the United States case 1971, again post Mirenda, post Miranda, Procunier Atachley, and the citation of that case, if your Honor please, is 400 U.S. at 466, wherein we have a situation in that case, where there was a police agent, admittedly Benny Lee was [88]

a *police agent,* and the Court on a habeas corpus proceeding, reviewing a lower Federal Court granting of a habeas corpus of the writ of habeas corpus, and overturning that lower court order, held that the pertinent test is whether the police agent deliberately, by acts of interrogation, by acts of inquiry, by acts of questioning deliberately elicits or adduces a statement from a defendant, whether the statement elicited from the defendant is a product of coercion; and in this particular case, they ruled it was not the product of coercion, that it wasn't the product of a man propounding a series of questions, of overburdening a defendant with interrogation.

The point being, Judge, and I'll draw my remarks to a close, very briefly, if your Honor please, Benny Lee was the recipient of a gratuitous spontaneous volunteered statement, pre Mirenda, post Miranda. That exception had always existed and it still exists today; and that's why, your Honor, I ask this Court to rule that statement admissible.

The Court: Counsel—

Mr. Adler: If your Honor please, May I just [89] say, controverting the position stated by my good colleague, he talks about a voluntary statement.

I say to your Honor that this was—could not be voluntary—voluntarily made, even assuming that it was made, which we deny, because to be voluntary, one must know all the facts; and he certainly didn't know that this man, Benny Lee, was operating as an agent of the police.

In the cases which have been discussed by Mr. Cantor, he talks about a party being boastful or who insisted upon making statements to the police.

Our client is neither boastful nor insisted on making any statements, as evidenced from the testimony

given up; but what happened here, that there was a setup, and it was made—it was made after July the 9th, at which time—

The Court: Excuse me, counsel, are you sure about that date? I understood the July 7th—

Mr. Cantor: I think the final—

Mr. Adler: The final statement was made about the 24th as I understand.

The Court: You mean the statement was made—

[90] Mr. Adler: Yes.

The Court: I thought you were talking about the —the conversation with—by Detective Cullen with Mr. Lee.

Mr. Cantor: That's on the 7th.

Mr. Adler: That's on the 7th.

The Court: That's on the 7th.

Mr. Adler: I'm talking about Benny Lee, statement made while he's incarcerated.

The Court: I misunderstood you.

Mr. Adler: I say that was made after July 9th; and July 9th was the date of arraignment at which time he did have counsel; and it was at least made after the time that he was represented by counsel.

The Court: Yes.

Mr. Adler: And as such, I say it was violative of his constitutional rights.

Further, these came up after he was under arrest, and at a time after he—while he was being incarcerated; and after his counsel had been appointed for him, and without warning; and I say these cases are differentiated from a situation which he calls a party unnerved, a party, and I said before cannot voluntarily make a statement [90a] unless he knows all the facts; and the defendant here could not possibly have known all the facts because he didn't know that

Lee was working as an undercover agent for the police; and as an undercover agent for the police, I say he takes the position, and places himself in the same position as if he had been a police officer.

[91] Mr. Adler: As such, I ask that you strike out any testimony with reference to any statements made with respect at least to Mr. Lee.

The Court: All right, the Court reserved decision. We'll continue this matter tomorrow morning.

Mr. Cantor: Judge, can we approach?

The Court: Yes.

Mr. Cantor: Very well.

(Whereupon, there was a discussion off the record at the bench, among the Court, Mr. Cantor and Mr. Adler.)

The Court: As the Court has indicated, we're reserving decision until tomorrow morning in connection with the Huntley hearing.

* * *

Hearing Court's Decision

[141] Court Clerk Kurtz: People of the State of New York versus Joseph Allen Wilson; People, defense counsel and defendant are present.

The Court: The Court will now render its decision in connection with the Huntley Hearing. In this Huntley Hearing there are two questions for the Court to resolve. The first has to do with alleged statements made by the defendant to Police Officer Cullen and the second with respect to alleged statements made by the defendant in the presence of one Benny Lee.

As to the alleged statements made by defendant to the police officer, this Court finds that prior to his making such statements the police officer complied with the requisite Miranda warnings and accordingly this Court finds beyond a reasonable doubt [142] that said statements made by the defendant to the police officer were voluntary and in no way abridged the defendant's Constitutional rights.

With respect to the alleged statements made by defendant in the presence of Benny Lee, it appears that the defendant was placed in a cell with Benny Lee. Prior to defendant's arrest, the police spoke to Lee who at the time was an inmate of the Bronx House of Detention and asked him if he would act as a police agent and report to the police any statements made by the defendant in Lee's presence about the crime in question. He acceeded to this request. At the time he was advised that he was to ask no questions of the defendant about the crime but merely to listen as to what defendant might say in his presence. Mr. Lee so testified and stated that he had at no time asked any questions with respect to the crime but only listened to defendant and made notes regarding what the defendant had to say with respect to the crime in question.

Hearing Court's Decision

This Court finds that he, Lee, so acted and, accordingly, no interrogation was conducted by Lee of the defendant at the time they were cellmates. During the period they were cellmates, the defendant [143] reportedly made certain exculpatory statements. The question to be resolved is whether or not what defendant said in Lee's presense is to be suppressed.

This set of facts is distinguishable in the Court's opinion from People versus Mirenda, 23 N.Y.2d 439 at page 449, where the Court stated and I quote: "Statements made by a cellmate to another deliberately placed by the prosecution in proximity to the defendant in order to get statements would be a violation of a defendant's rights."

In Mirenda, it appears that the defendant was interrogated by the cellmate. Here he was not. The Court is persuaded by the fact that the defendant's utterances in Lee's presence were spontaneous and not a result of any interrogation by Lee. Any volunteered utterance by a defendant to anyone including a police officer or police agent, is admissible and should not be suppressed. Quoting from People versus Kaye, 25 New York 2d 139 at page 145, "no Court has yet held that a police officer must take affirmative steps by gag or otherwise to prevent a talkative person in custody from making an incriminating statement within his hearing".

Accordingly, the Court finds beyond a reasonable [144] doubt that the utterances made by defendant to Lee were unsolicited, and voluntarily made and did not violate the defendant's Constitutional rights and accordingly the motion to suppress same is denied. Of course you have an exception.

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Selected Trial Testimony of Detective Walter Cullen

* * *

[371] Q. So you were left alone in that Squad Commander's Office after advising this defendant of his rights with this defendant?

A. Right.

Q. And describe the interior, the furniture of that Squad Commander's Office, if you will, please.

A. There are two fairly large desks in the Squad Commander's Office. As you enter the Squad Commander's Office, one desk is to your right. The other desk is to your right but they're back to back. So if you're sitting at that desk, and I was sitting at this desk, we would be facing one another. Also, additional chairs in the office. There's a chair right next to the desk I was sitting at. There are filing cabinets, telephones, bulletin boards and—

Q. You were seated at a desk, sir?

A. I was.

Q. And where was this defendant?

A. He was seated at the desk alongside me.

Q. Now, after you asked this defendant if he would be willing to tell you his whereabouts on July 4, [372] and he said he would, what was the question—what was the first question that you asked him?

A. I then asked if he was working, and he replied that he was—that he had worked in—he was a stock clerk in the garment industry; however, he was unemployed at that time. He then went on to say— If I refer to my record, Your Honor?

The Court: You may.

A. (Continuing) That he left his home about 2:30 or 3 o'clock on that morning of July 4, 1970.

Q. I wonder if you would keep your voice up. You trailed off there.

A. I'm sorry.

Q. He said he left his home?

A. He left his house about 2:30 or 3 o'clock that morning.

Q. Now, Det. Cullen, as this defendant was speaking to you, were you taking notes, sir?

A. I was.

Q. And is that in the book that you have presently before you?

A. It is.

Q. Continue, sir.

A. He then continued and said that he stopped at an [373] after-hours place, and I interposed a question here. I asked him where was that. And his reply was on Westchester Avenue between 158th and Union Avenue. He met some people there and asked them what was happening. They told him nothing was happening upstairs. He then continued on. I then walked over to the garage to see my brother. When I got to the garage, I met my uncle, Rudolph Jackson, who told me my brother wasn't there. I talked to him and some other men about when I was pumping gas there on cold days. My uncle left. And then I went to the back to get me a soda. When I got back there two men were drinking soda. I then interposed a question and asked him to describe the two men and he continued. The first one was male, Negro, twenty to twenty one, thin face, jutting ears, five foot eight, 145 pounds wearing brown knit cap, beige zippered golf jacket, dark brown turtleneck shirt, brown pants, low cut playboy shoes, dark, ith a buckle. Number two man was male, Negro, twenty-five—twenty-four, twenty-five, six foot or six foot one, heavy-set, about 175 pounds, medium complexion, mustache, and goatee, black wavy hair, no hat, black zippered jacket, closed, dungarees or blue pants, white low-cut tennis shoes. Then he went on to say the first guy, and I interjected another question [374] there and said, "Well, he's Number One."

And he then proceeded to say Number One had his soda and was opening it. Number Two was getting his out of the machine. Then I got mine. I think it was Fresca. I don't knew what the other two were drinking. I took my soda in the back to look for my brother's tool box. I didn't find it. I was looking at the pictures on the wall and just looking all around. There was a mechanic working on a cab. I told him I was Mike's brother and engaged in idle conversation. At this point, I interjected a question. I asked what the conversation was and it was just conversation about repairing cars, and I put down idle conversation. That was my word.

[375] A. And then he continued. Then I said good night, then went to the dispatcher's office, to say good night to Sam. As I went through one door, going through the other door, I heard two shots.

Q. What did you say, "As I was going through one door going to the other door" or—

A. May I reflect back, your Honor?

The Court: Yes.

A. As I went through one door, going to the other door, I heard two shots. Then I went into the dispatcher's office and saw number one going through the window and I froze by the cigarette machine. Then number two came from the outside where the gas pumps are and number one started handing money to number two who was taking it and placing it in his jacket pockets, pants pockets and in his belt. Then number one came back out through the window and picked up the money from the inside in his arms. Then they ran and I ran. At this point, I interjected another question, I asked why did he run, and his reply was I was afraid I would get blamed. To Walton Avenue, and then started to walk, left, on Walton Avenue. Half-

way up the block and through the park and came out on the Grand Concourse. Then went south to about 151st Street.

Q. Is that the defendant's description of the route he [376] took when he ran, sir?

A. Yes.

Q. All right, continue.

A. And west on 151st Street to the Melrose Project, walked through and then made it to 790 East 158th Street, my mother's house, but I didn't go up. I then went to the donut shop on Prospect Avenue between 160th Street and Longwood Avenue. Stayed there about 20 minutes. Then I just walked up to 163rd Street, over to Southern Boulevard and then walked around in that area by myself. At this point, I injected another question; I asked him, did you get wet in the rain; his reply was what rain; and I said, oh, I thought it rained that night; his reply was I don't recall it raining. And about 10 a.m. I went to Wayne and Gale's house. I injected a question there and asked him where was that and his reply was 906 Girard Avenue, Apartment 1A; when I arrived I woke them both up; I asked him at this point who answered the door and his reply was Wayne answered the door and Gale remained in bed. Wayne let me in and I sat on the couch and I said to Wayne, I think I'm in a little trouble and said I'll discuss it with him later. He and Gale were sleeping in the living room and Wayne went and fixed me a couch in the bedroom. Then I lay down and was half awake and half asleep; about 12:30 or one, the defendant [377] said Gale but corrected himself and said Clair from upstairs came in and woke me up and said I hear you're in a little trouble and I said I don't want to discuss it; then we had general conversation. As this point I asked what was the conversation about and it was about them taking a trip or these people that lived in premises here taking a trip to Bear

Mountain with the kids for the holiday weekend. Then Wayne brought me in some breakfast, four fried eggs, bacon, biscuits, coffee. Then Wayne, then Wayne and I left, about two-thirty or three p.m., and went for a car ride in a car that Wayne's mother rented for me. Wayne parked the car between 160th and 161st Street and Tinton Avenue and then I went up 160th Street to Union Avenue, made a right, down to 158th Street and walked back up to Union Avenue and met Raymond; and while I was talking to Raymond, my brother came running up to me and said, man, what's happening, and I replied nothing's happening and he said Sam is dead and that I'm the only one identified for being on the premises. I said I was on the premises and was there when it went on but I didn't want to discuss it. Then he told me that the cops had broken down my door and had bullet proof vests and guns and said that I was armed and dangerous and that really shook me up. Then I told him I'll call you later and at this point he said [378] that's all and I said that's all? Do you want to tell me what you did between July 4 and July 8th; he said, no, that's all.

Q. Detective Cullen, are you acquainted with that donut shop by Longwood Avenue?

A. Yes.

Q. How long would it take sir at a normal pace walking to walk from the garage at 121 East 151st Street to that donut shop?

Mr. Adler: I object to that, conjecture.
The Court: Objection overruled.
Mr. Adler: Exception.

A. I would say at least 45 minutes.

Q. Detective Cullen, you were first called into this case on July 4th, 1970, is that correct?

A. Yes.

Q. On what date from July 4th on did the name of this defendant come up in your investigation?

Mr. Adler: I object to that.
The Court: Sustained.

Q. Detective Cullen, do you know a man by the name of Benny Lee?

A. Yes.

Q. And have you ever worked as a police officer with [379] Benny Lee?

A. Yes.

Q. And what was Benny Lee with respect to your job?

A. An informer.

Q. And had you utilized Benny Lee's service prior in other cases, before July 4th, 1970?

Mr. Adler: I object to that.
The Court: Objection overruled.

A. Yes.

Q. And Detective Cullen, in the early part of July, 1970, if you know, where was Benny Lee residing?

A. In the Bronx House of Detention.

Q. And Detective Cullen, did you go over to see Benny Lee in the early part of July of 1970 at the Bronx House of Detention?

A. Yes.

Q. And without going into the contents of any conversation, did you make certain requests of Benny Lee at that time?

A. Yes.

Q. And Detective Cullen, did there come a time when you then visited Benny Lee again and I'm referring to July 24th, I think, of 1970.

A. Yes.

[379] Q. And again without going into the contents of any conversation on that partiuclar date, did Benny Lee impart certain information to you?

A. Yes.

Mr. Cantor: Can I have it marked for identification, Judge?

The Court: Yes. For Identification.

[People's Exhibit 10 for Identification marked]

[380] Q. Detective Cullen, take a look and examine People's 10 for identification. Detective Cullen, is People's 10 for identification, a piece of paper that was given to you?

A. Yes.

Q. By whom?

A. Benny Lee.

Q. Was that on July 24th when you visited him for the second time?

A. Yes.

Q. And by the way, Detective Cullen, do you know where this defendant was lodged after he was arrested by you on July 8th, 1970?

A. Bronx House of Detention.

Q. And Detective Cullen, do you happen to know whether at any time during the period that this defendant was lodged at the Bronx House of Dentention whether or not he shared a cell with Benny Lee?

A. Yes.

Q. Did he?

A. Yes.

Q. Detective Cullen, at any time during your investigation of this case, did you ever make any promises whatsoever to Benny Lee?

[381] A. No.

Q. Did any other officer in your presence ever make any promises to Benny Lee with respect to this case?

A. No.

Q. Or any case for that matter?

A. No.

Q. Did any assistant district attorney, including myself, in your presence, Detective Cullen, ever make any promises to Benny Lee?

A. No.

Q. And when you received People's Number 10 for identification, this slip of paper, given to you by Benny Lee, what did you do with it, Detective Cullen?

A. I put it in the case file.

Q. And when you came up to my office on March 20, 1972, was the piece of paper included in the case file that you brought with you?

A. Yes.

• • •

[394] Q. Now, Officer, you say you spoke to Mr. Lee, Benny Lee; is that right?

A. Yes.

Q. Now at the time you spoke to him, as I recall, you said he was in the House of Detention?

A. Yes.

Q. Was he there as a result of a crime which he was charged?

Mr. Cantor: I'm going to object, Judge.

The Court: Sustained.

Q. Well, did you know the reason for his being there?

Mr. Cantor: Objection, Your Honor.

The Court: Sustained.

Selected Trial Testimony of Detective Walter Cullen

Q. Well, did you have a conversation with him regarding what would happen if he informed on anyone [395] that was placed in the same cell with him?

A. Did I have a conversation with him?

Q. Yes.

A. Yes.

Q. Did you tell him what to do?

A. Yes.

Q. Did you make any promise to him that if he did what you told him there would be some consideration given him?

A. No.

Q. He did this voluntarily?

Mr. Cantor: Objection to the characterization.

The Court: Sustained.

Q. As a result of your conversation?

Mr. Adler: I'm sorry, I didn't get your ruling, sir.

The Court: The first part I sustained your objection.

Mr. Adler: Exception.

Q. Did you know that he was charged with a—

Mr. Cantor: Now, Judge, I'm going to object to Counsel testifying under the guise of asking a question, Judge.

The Court: Sustained.

[396] Q. Did you know the history of Benny Lee before he—

Mr. Cantor: Objection, Your Honor.

The Court: Objection sustained.

Mr. Adler: I have an exception, if Your Honor please.

The Court: You have.

Selected Trial Testimony of Detective Walter Cullen

Q. What did you tell Benny Lee?

A. What did I tell him?

Q. Yes.

A. I asked him, actually.

Q. What did you ask him?

A. This was on the 7th, I went over and visited him and I told him I was anticipating making an arrest. Brought a picture of the defendant with me, showed it to him, asked him if he knew him. He said he did. I asked him would he object if I made arrangements to have him put in the same cell with him in relation to the other two perpetrators who were not yet apprehended. I had no interest in your defendant, Counselor. Just the other two defendants.

I told him not to ask questions, just to remain in there and pay attention to what he heard and report it back to me.

[397] Q. So you say to me you had no interest in my defendant?

A. No.

Q. You intended putting Wilson in the same cell with an informer, without any interest in him?

Mr. Cantor: Objection, Your Honor.

The Court: Sustained.

Q. Well, Officer, weren't you interested in having him arrested?

A. Yes.

Q. And weren't you interested in getting information as to a confession or an admission?

A. From Lee?

Q. From anyone?

A. No, not from Lee.

Q. Well, did you know anybody else you could get it from?

Mr. Cantor: I'm going to object, Judge.

The Court: Sustained.

Q. And I take it, you made no promises nor any discussion as to any leniency or any consideration in return for Lee's being an informer?

Mr. Cantor: Objection, repetitious, Your Honor.
[398] The Court: Oh, what harm is it?
Mr. Adler: No further questions.

Redirect examination by Mr. Cantor:

Q. Now at the time you spoke to Benny Lee, you told defense counsel here that you asked Mr. Lee to, if he would, keep his ears open so to speak, since you were going to make arrangements if he agreed to have the defendant, upon the arrest of the defendant, placed in the same cell with Lee; is that correct?

A. Yes.

Q. And that was on July 7th that you had this initial conversation with Lee when you were expecting to make an arrest imminently of the defendant; is that correct?

A. Yes.

Q. And subsequently on July 8th, the next day, you did, in fact, make that arrest of this defendant? Is that correct?

A. Yes.

Q. And you did then make arrangements or had arrangements made to have this defendant placed in the same cell with Lee?

A. Yes.

[399] Q. Now at the time that this defendant was arrested on July 8, 1970, after you had spoken to Lee on July 7, 1970, were the other two perpetrators arrested?

A. No.

Q. And once you had arrested the defendant, Joseph Allen Wilson, or even going back further, once his name was in your possession and you went to see Benny Lee on July 7th and told Lee that an arrest was imminent of this

defendant, was your primary interest then focused on this defendant whose name you knew and whose arrest was imminent or upon the other two perpetrators?

Mr. Adler: I object to that as an operation of his mind.
The Court: Objection sustained.

Q. Will you tell us, sir, on July 7, 1970, when you went to see Benny Lee, were you interested in getting information concerning this defendant Wilson, whose name was known to you, or concerning the other two perpetrators?

Mr. Adler: I object to ath, sir.
The Court: Objection sustained.

Q. But in any event, Detective Cullen, you did [400] have occasion to go back on July 24th to see Mr. Lee for a second time after he had been in the same cell with this defendant?

A. Yes.

Q. And on that particular occasion did Benny Lee give you information concerning the other two perpetrators?

Mr. Adler: I object to what was done.
The Court: Objection sustained.

Q. Well, taking a look at People's No. 10 for identification, Detective Cullen, will you read it to yourself.

Are those the notes that Benny Lee made of his conversations with this defendant in jail, sir?

Mr. Adler: I object to that.
The Court: Objection sustained.

Q. Does that exhibit, People's No. 10 for identification, contain information regarding the other two persons in this case?

Selected Trial Testimony of Detective Walter Cullen

Mr. Adler: I object.
The Court: Sustained.

Q. Detective Cullen, do you have occasion to remember defense counsel asking you on cross-examination what your conversation was with Mr. Lee on the first [401] you saw him in the Bronx House of Detention?

A. Yes.

Q. Let me ask you, now, sir, tell us the conversation you had with Mr. Lee on the second occasion, July 24th, when you went to see him?

Mr. Adler: I object to that, sir.
The Court: Sustained.

* * *

Trial Testimony of Benny Lee

[502] Court Officer: Witness' name is Benny Capital L-E-E.

MR. BENNY LEE, having been called as a witness by and on behalf of the People, testified as follows

Direct examination by Mr. Cantor:

Q. Now, Mr. Lee, are you currently an inmate in one of the New York State detention facilities?

A. Yes sir.

Q. And Mr. Lee, do you know a Detective Walter Cullen?

A. Yes sir.

Q. You see him here in the courtroom?

A. Yes sir; he's sitting right out there.

Q. Will you point him out again?

A. Right there in the first row.

Mr. Cantor: May the record indicate the witness has indicated Detective Cullen.

Q. Now, Mr. Lee, in July of 1970, for about how long had you known Detective Cullen?

A. For about five years prior to that.

Q. And Mr. Lee, during that period of time, during that five year period of time, had you ever supplied [503] any information to Detective Cullen?

A. Yes, sir.

Q. Mr. Lee, let me refer you to July 7, 1970, on that particular day were you in the Bronx House of Detention?

A. Yes, sir.

Q. And did you see Detective Cullen there?

A. Yes, sir.

Q. Did he come to visit you?
A. Yes he came to visit me.
Q. And did he have a conversation with you?
A. Yes he did.
Q. And did he make certain requests of you?
A. Yes.
Q. Tell his Honor what Detective Cullen asked of you?

Mr. Adler: I object. What Detective Cullen asked of him. Not in the presence of the defendant.
The Court: You press your objection?
Mr. Adler: No, I'll make no objection.
The Court: All right.

Q. What did Detective Cullen ask you?
A. Detective Cullen told me there was a robbery and murder committed at the Star Garage.

[504] Mr. Adler: I'm sorry; I didn't hear.
Mr. Cantor: Go ahead, you may continue, sir.

A. Detective Cullen—

The Court: He didn't hear; excuse me just a moment, did you hear what was said?
Mr. Adler: I didn't get what he said.
The Court: Read what was said Mr. Reporter as far as you got it.

(Reporter read back last answer on page 503 as directed)

Q. Continue please.
A. And he had a suspect that he was looking for and he showed me the defendant's picture.
Q. Now, prior to that time did you know the defendant?
A. Not very well, no. But I've seen him around.

Q. All right. And did he tell you the name of the defendant when he showed you the picture?
A. Yes he did.
Q. And what name was that?
A. Allen Wilson. Joseph Allen Wilson.
Q. And what did he continue to ask you, Detective Cullen?
A. Well, he said that he was expecting the arrested man at any time and if the man, when he got the man in custody he would have the man put in my cell in the House [505] of Detention. When the man got there, I was just to keep my ears open and see if I could find out who the other two men were that were with him on the—
Q. I couldn't hear the last—two other men that were—
A. With him on the job.
Q. Now, Mr. Lee, did you agree to that request?
A. Yes I agreed.
Q. Now, Mr. Lee, after Detective Cullen came to see you, you were in a cell, in the Bronx House of Detention, is that correct?
A. Yes.
Q. All right. And on what floor was that cell when Detective Cullen came to see you?
A. Oh, was in the sixth floor, six south.
Q. And when you first were put into six south on that cell, were you alone or did you have a cellmate, when you first came in there?
A. I was alone.
Q. And did there come a time when you got a cellmate?
A. Yes.
Q. And who was that.
A. Joseph Allen Wilson.
[506] Q. You see the defendant here in Court today?
A. Yes, sir.

Q. Point him out?
A. Right there.

Mr. Cantor: May the record reflect the witness has indicated the defendant Joseph Allen Wilson.

Q. And for how long a period of time did you say you were in that cell in six south and alone before Wilson became your roommate, your cellmate?

A. About a week, few days.

Q. Now, Mr. Lee there came a time on July 13th, 1970, that this defendant became your cellmate is that correct?

A. Yes, sir, that's correct.

Q. Now, when you were up on six south in that cell, did that cell have a window?

A. Well, actually, the cell didn't have a window but the cells on six south are kept open all day and you could walk up to the cell block and look out the window.

Q. Well, if you looked out the window on that cell block—

A. Yes?

Q. What did it over look?

A. It overlooked the Star Garage.

[507] Q. And that's on 151st Street?

A. On 151st, yes.

Q. Now, Mr. Lee, when this defendant came up to your cell and joined you as a cellmate on July 13th, about one o'clock in the afternoon on that day, did he say something to you?

A. Yes; I was laying down in my cell and I was facing the wall so I didn't hear him come in because the doors are kept open and the first thing I remember him saying is somebody's messing with me, man; that was how he announced his presence to me and I turned around and he said somebody's messing with me because this is the place that I'm accused of robbing and he was looking out the

window towards the Star Garage. So I sat up and we began talking and—

Q. What did he say?

A. Well, he went right into the conversation. He told me that a few nights earlier that he had gone over to the Star Garage, to see his brother who worked there and as he was coming up to the front of the door he met two men and the, one of the men asked him, is there a soda machine inside, and he said yes, and he directed the men to the soda machine. He walked inside and talked to some people and he got thirsty and he went to the soda mechine [508] and as he was drinking his soda he heard two shots and he saw the two men run out of the office, stuffing money in their clothes and in their pockets and dropping money on the ground. They ran out on to the street, so he picked up a little bit of money off the ground and put it in his pocket, walked out behind the men, then he followed them up the street.

Q. Now, Mr. Lee, after the defendant told you that, what if anything did you say to him?

A. Well, I said, look, you better come up with a better story than that because that one doesn't sound too cool to me, that's what I said.

Q. And what did he reply?

A. Well, he didn't say anything, he just kept looking out the window and he never changed any of his story, not that day.

Q. Now, how long all together would you say approximately you were in the same cell with this defendant?

A. Oh, approximately 10 days, 9 or ten days.

Q. All right. After that first day when he told you that first story, Mr. Lee, on the second and on the third and fourth day, did this defendant have occasion to tell you other things?

Mr. Adler: I object to the word "story". He
[509] said when he told you the first story.

The Court: Rephrase it.

Q. All right; after his first statement to you on that first day Mr. Lee, on the second and third and fourth day, during the course of those next three days, did he have occasion to make another statement to you?

A. Yes.

Q. Now, this other statement, Mr. Lee, did it come all at once or come in bits and pieces?

A. No, gradually, he changed the words in bits and pieces.

Q. And by the fourth day, that you were in the cell, on the sixth floor with this defendant did you get a new statement from him?

A. Yes.

Q. And by the fourth day, you were in this cell, tell his Honor and tell the members of the jury by that time what this defendant Joseph Allen Wilson had told you?

A. Well, we talked for several nights and talked about different people in the street, and gradually he told—he changed his story a little bit; he said that he knew that there was a lot of money there on that particular weekend because it's a long weekend.

The Court: Excuse me a minute; Till the plane
[510] passes.

A. Yes.

The Court: You may continue.

A. And, how he thought it would be a good time for a job over this—its the 4th of July weekend, because it was a long weekend and there would be a little bit more cash there and he said he was planning it for a long time and

he and two other men, he mentioned several names but he never identified the men that were with him that night by name. He never said who it was. So he said he walked in first and he cased the place, so that everything was all right, went back outside, got his two partners, they came back in, went to the office, shot Sam, the man—that was the man's name, got the money, they were dropping money in their pockets and stuff and ran out of the place, run to this park about a block from the place, stopped to—that was the rendezvous, to get the money straight and see what they were going to do and finally they walked through the park to Grand Concourse and got a cab to— I think it was 156th Street and Tinton Avenue.

Q. And did he tell you Mr. Lee, did this defendant ever tell you which one of the three men, whether it was himself or one of the other two men that shot Sam, did he ever tell you specifically which one?

[511] A. No, sir he did not.

Q. And Mr. Lee did this defendant ever tell you what he had heard after this murder and after this robbery?

A. Well, he said—he had heard that the police had cordoned off the block where he lived at, and came to his house with bullet proof vests on and broken down his door with shotguns and they were looking for him to kill him, they probably would kill him on sight.

Q. Is this what he told you?

A. Yes.

Q. And did he tell you where he was during that period of time when the police were looking for him?

A. Well he never said where he was but he said he was right under their noses all the time, but they never found him.

Q. And did the defednant ever tell you the circumstances why or under which he came to turn himself in to the police station?

A. Yes, he said the money was running out, and he was very scared; he was scared that the police wouldn't give him a chance if he ever was walking around and happened to run on him they would just shoot him down and he was very scared and he figured the best thing to do would be to turn himself in.

[512] Q. Now, did [illegible] a time Mr. Lee on July 24 1970 that Detective Cullen again came to visit you at the Bronx House of Detention?

A. Yes.

Q. And was that after the defendant had made those statements to you that you just told us?

A. Yes.

Q. And when Detective Cullen came to see you Mr. Lee, did you tell Detective Cullen what you've told his Honor and the jury here today in so far what this defendant told you when you were in the same cell with him?

A. Yes.

Q. Now, during the period of time, the second and the third, and fourth day when this defendant was giving you this new statement, did you during that particular time have occasion to make any notes as to what this defendant was saying?

A. Yes I did.

Q. Would you be so kind as to take a look at People's number 10 for identification Mr. Lee? And read it. To yourself.

The Court: To yourself.

A. Yes. This is the same. I mean this is the notations I made.

[513] Q. And when Detective Cullen came to see you that second time, and after you told Cullen what this defendant had told you, did you also give Cullen that particular piece of paper?

A. Yes I did.

Mr. Cantor: If your Honor lease, I offer it in evidence.

Mr. Adler: No objection.

The Court: I didn't hear you.

Mr. Adler: No objection.

(Marked People's Exhibit 10 in Evidence, sheet of paper)

Court Officer: People's 10 previously marked for identification, now People's 10 is evidence.

Mr. Cantor: That's only one side, Judge; the side that's stamped. The other side has nothing to do with this matter.

The Court: All right, bear with me.

Mr. Cantor: Surely.

[514] Q. Now, Mr. Lee—

The Court: Just the front side.

Mr. Cantor: Just the front side.

The Court: All right.

Q. Mr. Lee, People's Number 10 in evidence, is this a word for word account of what the defendant told you or was it merely your notations?

A. Just merely my notations.

Q. Now, Mr. Lee, what was your purpose in making notations at that particular time, during this period when the defendant was making these statements to you?

A. Well—

Mr. Adler: Just a moment, I want to think about whether I want to let this in or not, Judge. Will you give me a half a minute, please?

The Court: Yes.

Mr. Adler: No objection.
The Court: You may answer that.

A. When I made these notations I was just making note of what he dwelled on the most, things that seemed to be on his mind most.

Mr. Adler: I object to that as not responsive.
Mr. Cantor: It is indeed, you Honor. I [515] asked him his purpose, his own subjective purpose.
The Court: Objective overruled.
Mr. Adler: Very well.

Q. Did you make notations specifically of all the names of individuals that this defendant gave you?
A. Yes; I did.
Q. And did Detective Cullen ask you to especially keep your mind open to any names that this defendant might mention?
A. Yes.

Mr. Cantor: And if your Honor please, since this document is in evidence, may I read it—
The Court: Yes.
Mr. Cantor: To the jury?
The Court: Yes.
Mr. Cantor: "We were hiding right under their nose" meaning 42 area, 42nd area "Junior Butts, Rooney; these two are high reg. crime—Brother Homes (ph). He mentioned them only by first names, but then lies about them. These names seem to stick in his craw—Jimmy Briggs, Banjo. "All my family asked why did I kill Sam; he was such a nice man." This worries him a lot.

Clare or girl friend who lived with his mother "My [516] old lady won't tell them anything, what she knows—police. Quote enquote. "We went

through park, took cab. Tinton and 156 and walked the rest of the way.

"Worries about statements made at police station. Swears to kill uncle if ever free because uncle is telling family he killed the boss." Close quote.

The Court: What's the number of that exhibit?
Mr. Cantor: Ten, your Honor.
The Court: Then?
Mr. Cantor: Yes.

Q. Now, as you said, Mr. Lee, you did not put down everything on this one small piece of paper that the defendant told you during the course of the second, third, and fourth day; is that correct?
A. That's correct.
Q. Now, Mr. Lee, when Detective Cullen visited you for the second time on July 24th and you told him what this defendant had related to you; and when you gave him your own notations of any notes or key points that you made on this piece of paper, did Detective Cullen ask you if you would be willing to repeat that in court when the case came to trial?
A. I don't recall. I don't remember that.
[517] Q. All right, did there come a time, Mr. Lee, this past month in March of 1972 that you were brought down from upstate?
A. Oh yes.
Q. And who brought you down, sir?
A. You did, Mr. Cantor.
Q. Now, Mr. Lee, when I brought you down from upstate, and that was about how many weeks ago approximately?
A. Three weeks.
Q. Mr. Lee, did I ask you if you would be willing to repeat what you told Detective Cullen, and what this defendant told you in open court?

A. Yes, sir.

Q. And what was your response to that?

A. Yes; yes.

Q. Now, at any time, Mr. Lee, with respect to this case, and this case only, did Detective Cullen ever make any promises to you?

A. No, sir.

Q. Did any other police officers with respect to this case ever make any promises to you?

A. No, sir.

Q. And, Mr. Lee, when I called you down from [518] upstate, and I asked you if you would be willing to repeat in court what this defendant told you, did I make any promises to you?

A. No, sir.

Q. Now, Mr. Lee, you've testified that you told me that you would be willing to repeat in open court what this defendant told you; is that correct?

A. Yes, sir.

Q. And what was your reason for that?

A. Well, I've been upstate and I wanted to rehabilitate myself. I'm trying to rehabilitate myself.

Mr. Adler: I object to this. I object to all of this, your Honor.

The Court: Objection overruled.

Mr. Adler: Exception.

Q. You may continue.

Mr. Cantor: May counsel be seated while the witness is testifying?

Mr. Adler: I wish he would speak a little louder.

The Court: He has a right to stand up if he's making an objection. Go ahead.

A. I just figured by telling the truth, I might help to rehabilitate myself.

[519] Q. Now, Mr. Lee, you've been convicted of crimes in the past, have you not?

A. Yes, sir.

Q. And you spent some portion of your life behind bars in jail?

A. Yes, sir.

Q. And Mr. Lee, when I called you down from upstate and I asked you, Benny Lee, if you would be willing in open court to tell me, to tell the Judge, and to tell the jury everything that this defendant told you inside the Bronx House of Detention, and when you told me you would, was that because you wanted to tell the truth to help me, to help to rehabilitate yourself?

A. Yes.

Q. Is it your intent, Mr. Lee, when you get finished with whatever time you're doing, to try to go straight?

A. Yes, sir.

Q. Now, Mr. Lee, from July 24th, 1970, the last time you saw Detective Cullen until you came down from upstate, in my office, about three weeks ago, that's a period of approximately 20 months; is that correct?

A. Yes.

Q. During that period of time, Mr. Lee, did you [520] talk to anyone, any inmates in any institution that you were, or anyone concerning this case?

A. No, sir; I didn't.

Q. After speaking to Detective Cullen,—was the first person you spoke to concerning this case myself, when I called you down from upstate and had you brought here?

A. Yes, sir. Oh, there's one other thing I would like to say.

Mr. Adler: I object, if your Honor please.

Q. Is that in response to my last question?

A. Yes.

Mr. Cantor: The witness indicates he would like to say something in response to my last question.

The Court: All right, you may.

Q. It was wrong. I wasn't upstate for 20 months. I got out on bail in 1970 and I was upstate since last May. I was sentenced upstate.

Q. But when I brought you down—

A. Oh yes.

Q. —pursuant to Court Order—

A. Yes.

Q. —to my office, you were doing time upstate?

[521] A. Yes, yes.

Mr. Cantor: I have no further questions on direct.

Mr. Adler: May we approach the bench, Judge?

The Court: Yes.

(Whereupon Assistant District Attorney Cantor and Counsellor Adler approach the bench and confer with the Court off the record and out of the hearing of the defendant and the jury.)

Cross Examination by Mr. Adler:

Q. Just by way of incidents, when you were first arrested, the time you were put in that cell and you were in that cell in July 1970, had your bail been fixed at that time?

A. Yes.

Q. And what was the amount of that bail?

A. $10,000.

Q. And was there any time thereafter—was the bail reduced?

A. No, sir.

Q. You raised the $10,000?

A. Yes, sir.

Q. Now, what were you charged with?

[522] Mr. Cantor: I'm going to object.

Q. —at that time?

Mr. Cantor: I'm going to object to charges.

The Court: Yes.

Mr. Adler: I would like to show you his interest, your Honor.

The Court: No, but—objection sustained.

Mr. Adler: Well—

Mr. Adler: Let me put it this way.

Q. Did you plead guilty in that, against the charge that was made for the time you were in the jail in July, 1970?

A. Yes; yes.

Q. And was it to a reduced crime?

A. Yes.

Q. Not from that charge in the indictment?

A. Yes, sir.

Q. And how much of a reduction was it?

A. I don't know.

Q. Well, what were you charged with?

Mr. Cantor: I'm going to object Judge.

Mr. Adler: I'll withdraw it.

The Court: What was the crime that you were charged with; do you know?

[523] The Witness: Robbery.

The Court: Robbery?

The Witness: Yes.

The Court: In the first degree?

The Witness: Yes, sir.

The Court: All right, and what did you plead to?

The Witness: Robbery in the third degree.

The Court: All right, there's your answer.

Q. Prior to that, had you been charged—had you been convicted of any crime?

A. Yes, sir.

Q. What crime were you convicted of the first time in your life?

A. Unlawful entry.

The Court: Just a moment please—Madam Reporter—

(Answer repeated by the Court Reporter.)

Q. Did you go to jail for that?

A. No, sir.

Q. Were you thereafter convicted of another crime?

A. Yes, sir.

Q. And what was that?

[524] A. Another unlawful entry.

Q. And did you go to jail for that?

Mr. Cantor: Judge, I'll object. The fact that he went to jail doesn't—

The Court: It is not material whether he went to jail or not.

Mr. Cantor: Objection.

Mr. Adler: I want to know when he first decided to rehabilitate himself.

The Court: That's all right. Let's find out whether—what he was convicted of. Whether he went to jail or not is something else again.

Q. Did you have another crime after that charged against you? Withdrawn. Were you convicted of another crime after that?

A. Well, that's all I remember right now.

Q. Well, do you remember what crime you were convicted of prior to robbery in the first degree?

A. Unlawful entry.

Q. And the robbery charge, was this a third—as a third offender, was it?

A. As a third offender?

Q. Yes.

Mr. Cantor: I'm going to object, your Honor.

[525] third offender treatment refers to felonies. This man has admitted to being convicted for a misdemeanor—unlawful entry.

Mr. Adler. Withdrawn.

Q. Were your convictions—did they constitute any felonies prior to the robbery?

A. Yes; I did. I have a robbery. I have another robbery. I did five years for that.

Q. Do you know how many years a first degree robbery charge would bring?

Mr. Cantor: Oh, objection, Judge.

The Court: Sustained.

Q. Second offender?

Mr. Cantor: Objection.

Q. When did you first decide to rehabilitate yourself?

A. When I was out on the street on bail, just before I got sentenced.

Q. And—

The Court: What is the year, please?

The Witness: 1971, April of 1971.

Q. Well you had—you've made some notes in 1970; did you not, in July?

A. Yes.

[526] Q. And were you going to rehabilitate yourself then when you made those notes that you have here in evidence?

A. Was I going to rehabilitate myself?

Q. Did you intend to rehabilitate yourself, yes.

A. No, not by making notes; no, sir.

Q. In July of 1970, did you intend to rehabilitate yourself?

A. Yes, yes.

Q. Well when in 1970 did you intend to rehabilitate yourself?

Mr. Cantor: Are we referring to July or the entire year?

The Court: July 1970. The question is plain. Overruled.

A. When did I decide to rehabilitate myself? In July of 1970, just prior to making the notes.

Q. Was it after Detective Cullen spoke to you?

A. No, I decided before that.

Q. Well, did you approach Detective Cullen and tell him that you wanted to rehabilitate yourself?

A. I was in jail. I couldn't approach anybody.

Q. Did you send a message?

A. No, sir.

[527] Q. Well, had you had any previous—I don't want to use the word dealings—did you ever have Detective Cullen ask you to do something for him?

A. No, sir.

Q. And was that before you were convicted of your second offense?

Mr. Cantor: Second offense?

Q. Second offense that you were convicted of, was that before that or after?

A. (No reponse)

Q. Withdrawn. Was it prior to the time that Detective Cullen saw you in July of 1970?

A. Yes, yes.

Q. How long before?

A. Oh, about since 1965.

Q. And was that—did he make an arrest of you?

Mr. Cantor: I'm going to object to "arrest", any reference to an arrest. It is only convictions.

The Court: Objection overruled.

A. Yes; yes.

Q. Well, did you squeal on anyone else?

Mr. Cantor: Judge, I'm going to object.

The Court: Objection sustained.

[528] Q. Did you give any evidence against any other defendant?

A. Yes.

Q. Other than Mr. Wilson?

A. I have.

Q. How many times?

A. Oh, I have no idea.

Q. Well, would you say 20 times?

A. A lot more. No.

Q. Would you say ten times?

A. Oh, I would say it would be close to 105 times.

Q. Did you get paid for that?

A. No, sir.

Q. Did you ever get paid for that?

A. No, sir.

Q. Are you aware of the fact, Mr. Cantor called you a "paid informer"?

Mr. Cantor: Judge, I'm going to object.
The Court: Objection sustained.
Mr. Adler: Exception.

Q. When is the last time you read the notes on this document that you wrote?

The Court: Referring to Exhibit what, 10?
Mr. Adler: Exhibit 10.
[529] The Court: In evidence.
Mr. Adler: People's 10. Exhibit 10.

A. Oh. right here today.
Q. First time?
A. The last time.
Q. When before that?
A. At the hearing that we had.
Q. How long ago?
A. Last week.
Q. And prior to last week, when did you read it?
A. Oh, the last time I saw that was when I handed it over to Detective Cullen.
Q. Now, where did you make these notes?
A. In Bronx House of Detention.
Q. In the same cell as the defendant?
A. Yes.
Q. In his presence?
A. Well, I don't recall if he was there or not, but he were around.

[530] Mr. Adler: May I have that last question and answer read to me.

The Court: You want the previous reporter brought back?

Mr. Adler: If we will agree with what was said, that would satisfy me. I don't want to take up the time of the Court. My recollection is, the question

and answer, that he don't remember the defendant being in the cell when he made these notes.

Mr. Cantor: I wouldn't subscribe to that. The question was, was the defendant present when these notes was made and the answer was he was there, quote, unquote. He was there.

The Court: Do you agree to that?

Mr. Adler: No, I don't recollect it that way.

The Court: All right, bring madam Reporter back.

(Whereupon, previous Reporter came back and read back last three questions and answers.)

The Court: Thank you, madam Reporter.
Reporter: You're welcome.

Q. Do you remember my asking you—Refer to Page 68 of the minutes—excuse me, Page 69, on the [531] bottom of Page 68—Do you remember being asked this question?

"Question: Where was the defendant when you wrote these?"

Referring to the notes. And the answer:

"Answer: He was there.

"Question: Who wrote them? He saw you write those?

"Answer: Yes, of course.

"Question: How far away was he when you wrote this?

"Answer: In jail, people mind their business. They keep their eyes—"

And I interrupt with a question:

"Question: I didn't ask you that. How far was he away?

And your answer:

"Answer: Maybe three feet.

"Question: Did you tell him you were making any notes about him?

"Answer: No."

Do you remember being asked those questions and making those answers?

A. Yes, sir.

[532] Q. Now, would you say he was within three feet of you when you wrote some of these notes at this time?

A. Yes, I still say that.

Q. Now, did he ever ask you what you were writing?

A. In jail, people mind their business.

The Court: No. Did he ever ask you?

The witness: No, sir.

The Court: All right.

Q. Well, did he confide to you anything other than the facts of this incident which happened on July 4, 1970?

Mr. Cantor: Judge, I'm going to object to that.

The Court: Sustained.

Q. Did he tell you any other things about his life?

Mr. Cantor: Judge, I—

A. I don't recall.

Mr. Cantor: In the interests of securing a fair trial here, I must object. I think counsel should reconsider that question because there are matters here that don't pertain to this case that if it came out might be severely prejudicial to his client, and I'm objecting in light of that.

[533] The Court: Mr. District Attorney, I think the defendant indicated no.

Mr. Cantor: The witness, Judge.

The Court: The witness. The witness indicated no. Is that what your answer was?

The Witness: Yes.

The Court: All right.

Q. So that—

The Court: So we're talking about a lot of things that's not necessary.

Q. Now, how long after he made these statements to you did you write down these notes?

A. Well, I wrote them down as he made them, as we went along. I didn't have any particular time.

Q. Did you write them—

Mr. Cantor: I don't think the witness completed his answer before counsel interrupted.

The Court: Have you completed your answer?

The Witness: Well, you know, just over a period of days I would make the notations and then I would, as he went, as we went along, of things that I thought would be of help to Det. Cullen.

Q. You wrote the things you thought would be of help to Det. Cullen?

[534] Yes.

Q. Now, when he finished telling you a statement, as you relate, how long after he finished telling you that did you put it on your paper?

A. I don't remember how long afterwards. But he was making statements and maybe the next day he would write it, and if it seemed to be in his mind a lot, well, that's what I put on the piece of paper.

Q. Well, would you put it down after he related it the second time?

A. I didn't—

Mr. Cantor: Judge, I'm going to object. The witness testified there was no pattern.

The Court: Objection overruled.

A. No, I would think—I just put it down as he went along. I don't remember the pattern which I did it, if I even had a pattern. I just figured that things would, may not mean—maybe these statements didn't mean much to me, but they would mean something to Det. Cullen because I wanted to help him with the case.

Q. You had no idea what would help Det. Cullen?

Mr. Cantor: Objection.

A. I had—

Mr. Cantor: I'll withdraw it.

[535] The Court: You may answer.

A. I know what would help Det. Cullen, but I figured these things would also help him. I knew what I wanted, what I was doing.

Q. I want you to follow with me, if you will. When he would finish you a story or a statement, as you call it, would you sit down, right then and there, and write down something on a paper?

A. No, sir, no. Not right then and there.

Q. Well, how long after?

A. Well, as I say, we were piecing together a story. Gradually he would tell me more and more. Sometimes he would make the same statements word for word. So that's why I put them down. Because I figured maybe they would be of help to Det. Cullen.

Q. So then you pieced it together; is that it?

A. No, I—

Mr. Cantor: Object to the characterization.

The Court: Objection sustained.

Q. Did you write this paper all at one time?

A. No, sir.

Q. You wrote it at different times?

A. Yes.

Q. And did you hand it to Det. Cullen when the [536] paper was completely written?

Mr. Cantor: The paper—

Mr. Adler: Wait a minute, now.

The Court: What do you mean by completely written?

Mr. Adler: Well, when this full page was written.

The Court: We're only referring to one side.

Mr. Adler: That's right.

Mr. Cantor: Not that side.

Q. I'm referring to this side. Did you give this to Det. Cullen when it was completely written on, that entire page, as far as the lettering goes?

Mr. Cantor: Well, Judge, I object. The lettering does not go down to the very bottom of the page.

Mr. Adler: I said as far as it goes, counsel.

Mr. Cantor: I object to the form of the question, Judge.

Mr. Adler: I'll withdraw the question.

Q. How many times did you offer this paper to Det. Cullen?

A. Just once. I gave it to him once, that's all.

Q. Well, did you ever write on this paper and [537] stop before the last word was written on it?

A. Yes.

Q. And what did you do with it? Where did you stop the first time?

The Court: Show it to him.

A. We were hiding right under their noses. I stopped then.

Q. May I see that, please.

A. Yes. Right on top.

Q. What did you do with the paper when you stopped writing with it? Where did you put it?

A. In my pocket.

Q. In the same cell that he was stationed with you?

A. Yes.

Q. And then when was the next time that you wrote on it? When did you stop?

A. Well, it might have been that same night. I don't —I really don't remember. This was over a period of ten days. I don't remember when I—I couldn't—

Q. Well, how many times did you write on it and stop?

A. I have no idea. I mean I don't know how many times I wrote on it then stopped.

[537A] Q. Well, when he again made a full statement, would you write all of the full statement down that he gave you or did you just put a little piece of it?

A. No, I would put the whole statement.

Q. Well, now—

A. All of it, yes, the whole statement.

Q. Well, may I have that, please. Is it your testimony then that the first time you discussed with him, you said he said to you we were hiding right under their noses. Is that all he told you?

A. No, that was the first statement that I considered important enough to put down.

Q. He didn't tell you anything else?

Mr. Adler: Withdrawn.

Q. What, if anything, else did he tell you?

Mr. Cantor: At what point, Judge?

Q. At the point that we were hiding under their noses.

A. You mean what did he say after that?

Mr. Adler: No. Withdrawn.

Q. You testified that you stated—You stated rather, that you wrote the first time your notations were we were hiding right under their noses, and you stopped.

[538] A. Yes.

Mr. Cantor: He testified that was the first thing of import that he put on the paper in his judgment, Judge. I object—

The Court: No, Mr. Cantor. We don't want your interpretation. The jury will disregard Mr. Cantor's remarks. Go ahead.

Q. Did he tell you anything other than we were hiding under their noses at that time?

A. That was just a piece of the story that he would come back to, and he seemed to come back to it like it was something important in it. So I thought maybe there might be.

Q. Well, now, you write in here: Junior, Butts, Ronnie, quotes. These two are his, quotes, R-e-g crime, and brother, quotes, homes. He mentioned them only by first names. Did you write that?

A. Yes.

Q. And then you say: but then lies about them. Their names seem to stick in his craw. Is that what you said?

A. Yes.

Q. Did you question him as to whether he was lying or not?

[539] A. No, sir.

Q. That was your own opinion that he was lying when you wrote this?

A. No. It was my opinion that the names stuck in his craw.

Q. And when you wrote that he was lying, that was—was that a result of your questioning him?

Mr. Cantor: Objection, Judge.

The Court: Objection overruled.

A. No, sir.

Q. It was just an opinion that you felt about it?

A. Yes, sir.

Q. Now, on these 150 times that you had been an informer or approximately 150 times, were you ever paid?

A. Was I ever paid?

Q. Yes. Were you?

A. Well, it all depends on what you mean by paid.

Q. Well, what do you mean by paid?

A. Well, I don't know.

Q. You don't know what payment means?

Mr. Cantor: I'm going to object to—

The Court: Objection sustained. Don't argue with the witness.

Mr. Adler: I'm sorry Judge. I didn't mean [540] to interrupt you.

The Court: Did you receive money for it or did you receive some other consideration? Do you know what a consideration is?

The Witness: Oh, yes. I received other considerations.

The Court: All right. Tell counsel.

Q. And did you receive a consideration on each time that you informed?

A. Yes.

Q. But this time, July 4? All but the July 4, 1970. You received nothing?

A. Yes, sir—No, sir, I didn't receive anything.

Q. You don't take drugs?

A. Yes, sir.

Q. Were you ever offered any drugs in consideration of your giving testimony?

A. No, sir.

Mr. Adler: No further questions.

Redirect examination by Mr. Cantor:

Q. Now, when you came down to my office, Mr. Lee, and I asked you if you would be willing to repeat what this defendant told you in open court, you testified [541] that I made no promises to you; is that correct?

A. Yes, sir.

Q. But exploring your intent, as counsel did, your state of mind, when you came down and you agreed to testify in open court, did you in your own mind have certain expectations?

Mr. Adler: You Honor, please—All right, I'll withdraw my objection.

A. Yes. I thought that my coming here today and telling the truth, that I could only help myself.

Q. And did you have expectations and hopes although no promises have been made to you, Mr. Lee, that if you testified and told the truth in this court as to what this defendant told you that the authorities would take note of that?

A. Yes, sir.

Q. Now, Mr. Lee, do you take shorthand?

A. No, sir.

Q. So this piece of paper, People's Number 10 in Evidence, Mr. Lee, this does not reflect word for word everything that this defendant told you over the period of ten days that you and him were in the same cell; is that correct?

A. That's correct.

[542] Q. Mr. Lee, the notations that are on this particular piece of paper, were these notations that you—made for a reminder for yourself so that when you spoke to Det. Cullen, this will alert you to certain things that you wanted to tell Det. Cullen as to what this defendant told you?

A. Yes, sir.

Q. Now, at all times that you were in this cell, with this defendant, Mr. Lee, for the period of ten days you testified that you would make some notations and then stop, and put the piece of paper in your pocket?

A. Yes, sir.

Q. At all times until you gave this piece of paper, People's Number 10, over to Det. Cullen, was this piece of paper on your person in your pocket?

A. Oh, yes, sir.

Q. Did you ever let it out of your possession?

A. No, sir.

Q. And for the most part, Mr. Lee, when you were in that same cell listening to everything that this defendant told you, were you for the most part listening to names that he would give you with respect to the other two people that pulled the job with him?

Mr. Adler: I object to that.

[543] The Court: Sustained.

Q. Now, you testified that you were in the same cell for approximately ten days with this defendant, is that correct?

A. Yes.

Q. And that by the end of the fourth day he had given you a new statement, completely new?

A. Yes.

Q. And between the fourth and tenth day, on the fifth, sixth, seventh, eighth, ninth, and tenth day, did he repeat some of the things that he told you on the second, third, or fourth day, that made up the new statements?

A. Yes.

Q. No, Mr. Lee, at times—

Mr. Cantor: Withdrawn.

Q. On the sixth floor at that particular time, during the daytime hours, did they keep the cell doors open?

A. Yes.

Q. And did the inmates have access to that floor, to that tier?

A. Yes.

Q. And were there times, Mr. Lee, by the way, were [544] you on the lower or upper bunk?

A. I was on the lower.

Q. And the defendant was on the upper bunk?

A. Yes.

Q. So that you could see if he peered his head down and looked at you, you could see him?

A. Yes, sir.

Q. And, Mr. Lee, at times when you made certain notations on People's Number 10 for Evidence, was the defendant either in the cell or up and down the tier on 6M?

A. Yes, he was—When I say three feet, I mean he was three feet away, but he could have been watching television or talking to someone.

(Continued on next page.)

[545] Q. Is there a television right there on six M, on that floor, on the sixth floor rather?

A. Yes, sir.

Q. And all of the inmates who have their cells on that floor there, their cells remain open during the daytime hours?

A. Yes.

Q. So they can congregate and talk amongst themselves?

A. Yes.

Q. And at times that you made these notations, the defendant would be somewhere from your presence, watching television or talking with inmates?

A. Yes, sir.

Mr. Adler: I object.

The Court: Sustained. Let the witness testify.

Q. All right. You tell us during certain times that you made notations on those, on this piece of paper, People's number 10 what the defendant was doing.

A. Well, one time he's watching television, another time he was writing a letter and another time he might have been talking to the other man.

Q. And were there times Mr. Lee when you made notations on People's 10 that the defendant was no where in the [546] vicinity.

A. Yes, sir.

Q. And for approximately when you made these notations on Peoples number 10, how long would you say on the average making these notations before you put it back in your pocket.

A. Maybe 20 seconds, or so.

Q. And then you put it back in your pockets?

A. Yes.

Q. Now you testified Mr. Lee, that you gave information to Detective Cullen approximately 150 times is that correct?

A. To the police 150 times.

Q. To the police?

A. Yeah.

Q. But is this the first time Mr. Lee that you're testifying in open court?

A. Yes sir.

Q. On all of those other occasions when you gave information to the police were you what is known as an undercover informant?

A. Yes, sir.

Q. Now, Mr. Lee, when you were serving the police as a confidential informer of course your identity was never [547] disclosed is that correct?

A. Yes that's correct.

Q. And is it not a fact that the reason your identity was never disclosed is because once it was disclosed your usefullness to the police would be at an end?

A. Yes, sir.

Mr. Adler: If your Honor please, I object to this.

Mr. Cantor: Well, Judge—

Mr. Adler: All right.

Q. And of course Mr. Lee, by your testifying here in open court today, in front of the whole world, so to speak, you of course realize your usefulness to the police is at an end is that correct?

Mr. Adler: I object to that. That's a conclusion.

The Court: Yes. Sustained. That's a matter of opinion.

Q. All right. Mr. Lee, you remember the defendant's attorney asking you a lot of questions about the number of times that you gave information to the police is that correct?

A. Yes.

Q. And on the many times you gave information to [548] the police did that information lead to arrests and convictions?

Mr. Adler: Oh, I object to that, sir.
The Court: Sustained.

Q. Well Mr. Lee is it not a fact that the information you gave to the police was reliable since the police came back to you for further information?

Mr. Adler: I object to that.
The Court: Objection sustained.

Q. But in any event Mr. Lee the police had enough confidence and reliability on you to use you approximately 150 times is that correct?

Mr. Adler: I object to that.
The Court: Sustained.

Q. And is it not a fact Mr. Lee that on several occasions during the time that you supplied information to Detective Cullen, Detective Cullen would give you a few dollars for coffee or things like that?

A. Yes.

Mr. Adler: I object to few dollars for coffee.
Mr. Cantor: O, Judge, counsel went into—
Mr. Adler: Let him talk about a few dollars but it may not be coffee.
Mr. Cantor: I withdraw that characterization.
[549] Mr. Adler: Let's find out how much then.
Mr. Cantor: Judge, you run this court.
The Court: Counsel, step up a minute.
Mr. Adler: Please forgive me, I didn't mean to intrude on your Honor's province.

(Off the record discussion at the Bench between the Court, Ass't DA. Cantor and Mr. Adler out of the hearing of the jury and the defendant)

Q. And did Walter Cullen, Detective Cullen, on several occasions give you money for cigarettes or incidentals, carrying around pocket money, so to speak?

A. Yes. Cigarettes, yes; and telephone.

Mr. Adler: May I have that last word, please.
The Witness: Telephone call.

Q. And Mr. Lee, you remember counsel asking you whether you raised that ten thousand dollars bail, you said you did?

A. Yes.
Q. Your family raised it, did they not?
A. My family, yes—
Q. Did your family, do they work sir for a living?
A. Yes.
Q. And who is that sir?
A. My father, he raised the money.
[550] Q. He raised it. And what does he do for a living, sir?
A. He's a cabdriver.
Q. And your father put up that ten thousand dollars bail that enabled you to come out of the Bronx House of Detention?
A. Yes, sir.
Q. And when you sir compromised that outstanding robbery case, Mr. Lee, you pled guily did you not?
A. Yes sir.
Q. You admitted to a judge in open court what you had done, is that correct?
A. Yes sir.

Q. And as a result of that admission, sir, as a result of your pleading guilty you were sentenced to prison, is that correct?

A. Yes, sir.

Q. And Mr. Lee, every single word that you have testified to in this court concerning what this defendant told you in Bronx House of Detention is it the God's honest truth?

A. Yes, sir.

Mr. Cantor: I have no further questions on redirect, Judge.

[551] *Recross-examination by Mr. Adler:*

Q. Incidentially, what date did you take that plea of guilty to third degree of robbery?

A. It was in February of—I forgot the date.

Q. Well, you remember what year?

A. Yes; it was last year. '71.

Q. '71?

A. Yes.

Q. And that was after July 4th, 1970, of course?

A. Yes.

Q. Now, when Detective Cullen would give you some dollars for cigarettes how much would he give you?

A. Never more than a dollar.

Q. One dollar?

A. Yeah.

Q. And did you want to tell him these facts in this and in the 140 other cases or to the other detectives or the district attorney to clear your conscience?

Mr. Cantor: I object to that.
The Court: Sustained.

Q. Well, did you do it because you wanted to be a good citizen?

[552] Mr. Cantor: Objection.
The Court: Sustained.

Q. Well, did you do it because you wanted to see justice done?

Mr. Cantor: Objection, Judge.
The Court: Sustained.

Q. Did you ever lie—withdrawn. Did you ever plead guilty to the unlawful entry case?

Mr. Cantor: Now, I'm going to object, your Honor.

The Court: Objection sustained.

Mr. Adler: Well, he's always telling the truth, Judge.

Mr. Cantor: Judge, I'm going to object to counsel's gratuitous comments.

The Court: Keep you voice down Mr. Cantor. I'd like to be heard.

Mr. Cantor: Very well, Judge.

The Court: It's immaterial whether he pleaded not guilty.

Mr. Cantor: I mean his own client entered a plea of not guilty in this case.

Q. Would you ever lie to save yourself from going to jail?

[553] Mr. Cantor: I object Judge.
The Court: Sustained.
Mr. Adler: No further questions.
The Court: Anything further Mr. Cantor?
Mr. Cantor: Nothing further, Judge.
The Court: You may step down, Mr. Lee. (Witness excused)

Wilson's First Petition For a Federal Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Petition for Writ of Habeas Corpus

U.S.A. ex rel., JOSEPH ALLAN WILSON
t/n JOE ALLAN WILSON,

Petitioner,

—v—

HON. ROBERT J. HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, AUBURN, NEW YORK,

Respondent.

State of New York) ss.
County of Cayuga)

I, JOSEPH ALLAN WILSON, first being duly sworn, deposes and says that:

1—I am a citizen of the UNITED STATES and over the age of twenty-one years.

2—I am the relator-petitioner herein and in all matters pertaining hereto, and the person who executed the aforementioned application for writ of habeas corpus.

3—Relator is not detained pursuant to a mandate, final order, commitment or process issued by a court or judge of the UNITED STATES.

Wilson's First Petition For a Federal Writ of Habeas Corpus

4—The cause of pretense of relator's detention is as follows:

On April 20, 1972, following jury trial and conviction of murder, and possession of a weapon, relator was sentenced on May 19, 1972, to twenty years to life and concurrent zero to seven years, imprisonment by the Hon. Edmund A. McCaffrey, Supreme Court of Bronx County.

5—This petition is based upon the contention that relator's conviction and detention contravenes the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution in that:

"Relator was deprived of due proces of law when:

A—The denial of relator's motion to dismiss the indictment for failure to prosecute was improper in view of the U.S. Constitution and laws of the State of New York.

B—The statements alleged to have been made by this relator to the arresting officer was improperly admitted into evidence.

C—The statements alleged to have been made by this relator to his cell-mate, a conceded police agent, was improperly admitted into evidence.

D—The court erred in failing to rule on or grant defendant's motion for discovery pursuant to CPL 240.20.

E—Relator has exhausted all available state remedies and is now properly entitled to Federal review and relief. Title 28 U.S.C., Section 2254; Fay-v-Noia, 372 U.S. 391; U.S. ex rel. Carafar-v-La Vallco, 334 F.2d. 331, inter alia:

Wilson's First Petition For a Federal Writ of Habeas Corpus

(a)—The Court of Appeals of the State of New York denied relator Leave to Appeal to that Court after affirmance by the Appellate Division, First Department on April 23, 1975.

Facts Briefly Stated

The people claim that the defendant went to the Star Maintenance Corporation (a taxi garage) at 121 East 151st Street, the Bronx, about 3:30 a.m. on July 4, 1970, with the intent to commit a robbery and that he, acting in concert with two others, did commit a robbery and did murder one Samuel Reiner, employed by Star as night dispatcher and night manager, who died as the result of being shot twice.

Defendant, who had been employed at Star for a few weeks about 18 months prior to July 4, 1970, and whose brother and uncle were employed by Star at the time of the crime, came into the garage alone, the People claimed, to "case" the situation and was joined there about twenty minutes later by two other men.

The defendant was placed at the garage by one employee before the commission of the crime and before and after the crime by two other employees by testimony given by three at the trial. None of the three knew the defendant prior to July 4, 1970, and all testified they had originally identified him after being shown photographs of five men by the police.

The two employee-witnesses who testified that they saw the defendant in the garage after the commission of the crime said they saw him with bills (money) cradled in his arms and that as he left the garage he said to them, "Keep cool. I've left something on the floor for you." None of the employees heard any shots fired or testified they had seen the defendant with a gun.

Wilson's First Petition For a Federal Writ of Habeas Corpus

The three employee-witnesses also testified they had seen the defendant in conversation with two other men in front of or in the garage just prior to the commission of the crime.

After arriving at the Star garage about 4:30 a.m. July 4, 1970, the police were given the employee file of the (illegible) around. The defendant then said good night to the mechanic and went to the dispatcher's office to say good night to Samuel Reiner. The defendant, according to the statement, heard two shots as he entered the dispatcher's office and the defendant "stopped by the cigarette machine." The defendant observed the two men he had seen earlier by the soda machine as they took money on hand in the office and then ran out of the garage. The defendant then ran out of the garage himself, being afraid that he would be blamed. He went to a donut shop and later went to the apartment of some friends where he remained for several hours. That afternoon, he left the apartment and, while talking with a friend on 158 Street saw his brother approach. His brother told him that Samuel Reiner was dead and that the police were searching for the defendant. The defendant told his brother that he did not want to discuss it and would call him later. The defendant, according to the statement, declined to tell the police what he did between July 4 and July 8, 1970, the latter date being the date when he came to the station house where he was arrested.

According to Lee's testimony at a preliminary hearing and repeated at the trial, the defendant first told him, in the absence of any questioning on the part of Lee, essentially the same story contained in the same statement to the police. Lee testified that he told the defendant "the story doesn't sound too good" and that two or three days later the defendant changed his story, said he did know

the two men by the soda machine, had planned with them the robbery and that in the commission of the robbery "we shot the man." Lee testified that the defendant, hearing that heavily armed police were searching for him and fearing for his safety, decided "to turn himself in." Lee testified that he made notes of the various statements made by the defendant and gave these notes to the police on July 24, 1970.

Deprivations of Due Process

(1—*The court erred in refusing to grant the defendant's motion for a dismissal of indictment for failure to prosecute, thereby denying the defendant-appellant his constitutional and statutory rights to a speedy trial.*

The defendant was not brought to trial until 20 months after his indictment (21 months after his arrest) and this delay resulted in a denial of his right to a speedy trial.

The CPL requires that a defendant be given a speedy trial "after a criminal action commenced." CPL 30.20. An action commences with the filing of an accusatory instrument. CPL 1.20(17).

While the New York State Constitution does not contain an explicit guarantee of a speedy trial, the legislature created such a right. *Code Criminal Procedure* 8(1). Subsequent provisions of the code attempted to set forth principles and standards fixing the concept of a speedy trial. *Code Crim. Proc.* 667-673.

The Commission Staff Comment to CPL 30.20 (derived from Code Crim. Proc., 8(1)) read in part:

> The existing Criminal Code statutes in this field have proven of little utility and most of the "speedy trial"

> and "good cause" for delay problems have been resolved by the courts on a case to case basis in accordance with their reactions to the particular facts presented (citing cases). The criminal Procedure Law does not carry over any of these code provisions, nor, at this point, does it offer any new legislation on the subject. The monumental task of formulating adequate speedy trial standards, complicated in New York by the wide diversity of courts and calendar problems, is still under study by the commission. Accordingly, the instant proposal temporarily contents itself with postulating the general requirements of a speedy trial and rendering any deprivation thereof a ground for dismissal of the pending charge (170.30 (1e), 210.20 1g)).

And the right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution has been held applicable to state prosecutions. *Dickey* v. *Florida,* 398 U.S. 30 (1970); *Smith* v. *Hoony,* 303 U.S. 374 (1939); *Klopper* v. *North Carolina,* 300 U.S. 213 (1967).

What are the particular facts in the instant case and, in light of these facts, was the appellant denied his right to a speedy trial?

The appellant, a 25-year-old, accompanied by his brother presented himself at the station house of the 44th Detective Squad, Bronx, on July 8, 1970, and was placed under arrest for the murder on July 4, 1970, of one Samuel Reiner. An indictment charging the appellant acting in concert with two others with the murder and with possession of a weapon as a felony was returned on August 27, 1970. The appellant entered a plea of not guilty on September 24, 1970. The trial of the appellant, who was held in $25,000 bail, was set down for trial after some 18 adjournments on March 29,

1972, in part 16, Supreme Court, County of Bronx, before Hon. William Kapolman.

The appellant announced his readines for trial. In an effort to crystalize for this Court the facts supporting his contention that he was denied a speedy trial, the appellant sets forth the following excerpt from the proceedings that day:

* * *

Mr. Adler: If your Honor please, we are ready for trial. (The defendant is present with Counslor Adler.)

The Court: Mr. Cantor?

Mr. Cantor: Judge, I understand that your Honor is currently in the midst of a trial.

The Court: And thereafter will be assigned to another part effective at the termination of this present trial.

Mr. Cantor: All right, may we step up Judge?

The Court: Yes, you may.

(There was discussion at the bench (illegible) and Mr. Adler.)

The Court: On consent of counsel.

Mr. Adler: No, don't put on my (illegible) to make a motion to have the indictment dismissed on the grounds of lack of prosecution.

The Court: You may make your motion.

Mr. Adler: All right. If your Honor please, at this time I would like to move to dismiss the indictment on the grounds of lack of prosecution* * *.

Mr. Cantor: Judge, I am receptive to any formal application of that nature so long as it is made in the customary formal manner on papers and submitted through Part 12* * *.

However, I would at this particular point say that this case just by way of background is the oldest case that

I have and it shall be tried in the April Term, Judge. Of course, given the understanding that I have a courtroom to go into in and a judge to try that case before. We are all aware of the problems, but this is my oldest case and this defendant shall be given a trial before any other defendant that I have in my case folder.

Mr. Adler: I must ask that the insistance on papers be waived by this Court for the reason this matter was set down for trial today, Judge.

The Court: The Court declines to wave the motion to be made on papers and directs counsel to make an application or motion before Part 12.

The case is now adjourned to April 11. The motion made by counsel for dismissal of the indictment for failure to prosecute is denied without prejudice to renewal in Part 12 on papers.

* * *

Proceedings, March 29, 1972, pp. 2-4.

The motion to dismiss for failure to prosecute was renewed (*Hearing & Trial* pp. 2-3), the court was advised by the People that some of the delay had been occasioned by the appointment of appellant's original counsel to the bench approximately 18 months after being assigned to represent counsel and that apppellant had requested some adjournments. The motion was denied. *Hearing & Trial* pp. 3-4.

Sec. CPL of the Code of Criminal Procedure provided that a person under indictment (illegible) the next term of court and failure to do so resulted in a dismissal of the indictment. *People* v. *Wilson*, 3 N.Y. 2d 391 (1961). (Indictment dismissed for a twenty-one month delay in bringing the case to trial.)

A defendant who is incarcerated pending trial is entitled to trial preference over all criminal actions, except

those in which a defendant has been at liberty on bail or recognizence for 180 days or longer. CPL 30.50.

The reason for the rule requiring a speedy trial were enuciated in *People* v. *Prosser,* 309 N.Y. 353 at 356:

(1) The accused is protected against prolonged imprisonment if he is held in jail pending trial.

(2) The accused is relieved of the anxiety and public suspicion attendant upon an untried accusation of crime.

(3) The accused is shielded from being "exposed to the hazard of a trial after so great a lapse of time" that "the means of procuring his innocence may not be within his reach . . ."

In this instant case, the appellant did not agree to the delay nor did he cause it himself. The appellant should not be denied his constitutional and statutory rights because of court congestion, or the failure of the police to apprehend his alleged co-defendants, or the prosecutor's system of selecting cases to be tried or an interruption in representation by assigned counsel, where, as here, some 18 months had elapsed following indictment and replacement of counsel made necessary by events beyond the control of the appellant.

The record in the instant case is not clear as to who requested the numerous adjournments nor what part of the delay was caused by court congestion. The appellant submits that in the interest of justice and due process and to protect his constitutional and statutory rights to a speedy trial that ambiquities in the record should be resolved in his favor. "The Fourteenth Amendment's guarantees do not depend on the action or inaction of any particular state agency or individual but protects the defendant against state action of any kind which deprives him of his rights."

Dissent: *People* v. *Ganci,* 27 N.Y. 2d 418 at 431, see also *People* v. *Purdy,* 29 N.Y. 2nd 800 (1971).

Both public and private interests compel the conclusion that every individual should be afforded a speedy trial, regardless of his ultimate guilt or innocence. *People* v. *Prosser,* supra, at 361.

The appellant not having been brought to trial at the next term of court after his indictment his motion for dismissal of the indictment for undue delay should have been granted in the absence of a "good cause to the contrary" showing. *People* v. *Wallace,* 26 N.Y. 2d 371 (1970).

On the facts of the instant case, appellant urges that the delay in bringing him to trial was prima facio unreasonable. Unlike the defendant in *Ganci,* supra, the appellant herein was not in jail serving time on another charge.

The appellant respectfully calls the Court's attention to recent requirements for speedy criminal trials in Federal Courts as promulgated by the United States Court of Appeals for the Second Circuit. In the absence of delays caused by the defendant or his counsel, or delays for good cause by the Prosecution, a criminal case must be brought to trial within six months of its commencement, and absent a showing of good cause for failure to do so the indictment must be dismissed. N.Y.L.J. Jan. 7, 1971 at 4, col. 8.

(2—*The Court erred in ruling that the statement made by the defendant to the arresting officer was voluntary and not coerced and that its admission was not violative of the defendant's constitutional rights.*

The arresting officer testified at the *Huntley* hearing in response to the people's question, "From the beginning, tell us what you said to the defendant and what he said to you" as follows:

He had a right to remain silent. I asked him if he understood. He said yes. I told him anything he did say could be used against him in a court of law. I asked him if he understood; he replied yes. I told him he could have an attorney; he had a right to an attorney now, at any time in the future. I asked him if he understood; he said yes. I told him if he could not afford an attorney, one would be provided for him free of charge. I asked him if he understood. He said yes. I then asked him, having understood all of this, do you wish to make a statement? And he replied no.

HEARING & TRIAL, pp. 23-24.

The arresting officer, now at this point left alone with the defendant, continued the interrogation and obtained a statement from him. The Court held the statement" * * * voluntary and in no way abridged the defendant's rights."

HEARING & TRIAL, pp. 141-142.

The statement subsequently was introduced into evidence by the People at the trial.

HEARING & TRIAL, pp. 370-378.

The defendant clearly was deprived by this ruling of his right to remain silent. The rule of *Miranda* is:

> Once warnings have been given, the subsequent procedure is clear. If the defendant indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilage; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle of otherwise." *Miranda* v. *Arizona,* 384 U.S. 436, 473-474.

The record is conclusive in the instant case that the arresting officer followed a course of "continued importunity," to use the felicitous phrase from the recent Court of Appeals decision which distinguished between continued questioning of a defendant after he has invoked his constitutional privilege and "a subsequent request, upon reiteration of the requisite warnings, for a reconsideration of the decision to make no statement."

PEOPLE v. GARY, 31 N.Y. 2nd 68, 70

(3—*The Court erred in ruling that statements made by the Defendant to his cell-mate, a conceded police agent, were voluntary and that the admission of said statements into evidence was not violative of the defendant's rights.*

The police on July 7, 1980, spoke with one Benny Lee, who was incarcerated at the Bronx House of Detention, and engaged his services in a clever scheme designed to extract information from the defendant, who was known to Lee. The scheme involved transferring Lee into a cell that overlooked the premises of the Star garage and then having the defendant placed in the cell with Lee. The police testified they had instructed Lee to obtain information regarding the identity of the two perpetrators who remained at large.

HEARING & TRIAL, pp. 34-36.

The psychological pressure exerted on the defendant worked, according to Lee, who testified,

> He (the defendant) came in about one o'clock. It was after lunch. And he was very upset about being moved up to the sixth floor. The garage which the crime was committed faces that part of the Bronx County, and

you can look right down into the garage * * * and he said that he had been accused of a robbery and a murder at the garage that was facing us, and he was upset about the fact that he was moved from one cell upstairs to another that faced that garage."

HEARINGS & TRIAL, pp. 56-57.

Lee testified at the trial that the defendant's initial statement to him was essentially the same as he was said to have made to the police at the time of his arrest. (Background, page 4, supra), but that the defendant changed his story a few days later and told Lee that he had planned and executed the crime in concert with two other men whom he never identified to Lee.

The peoplie conceded that Lee was an agent of the police.

(HEARING & TRIAL, p. 65.)

A "statement" as defined by the CPL includes a confession, admission or any other statement "made by a defendant with respect to his participation or lack of participation in the offense charged" and "may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made." CPL 60.45(1).

A statement is "involuntarily made" by a defendant when it is obtained from him by "any person" by the use "or threatened use of physical force upon the defendant "or by any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statetment." CPL 60.45 (2).

The defendant urges that the police methods to which he was subjected were in violation of rights guaranteed

to him by the constitution of this state or of the United States.

The scheme failed in its stated purpose of obtaining the names or the identities of the other two men seen at the Star garage on the morning of July 4, 1970. The admission of the Lee testimony and the alleged statement made by the defendant upon his arrest at the trial was the primary evidence offered to the jury linking the defendant with the crimes of which he was charged.

(4—*The Court erred in failing to rule on or to grant defendant's motion for discovery.*

The defendant submitted a pro se motion for discovery, seeking, inter alia, statement made by the defendant. The record is not clear as to the decision of the court to which the motion was originally addressed nor does the record indicate that the court ruled on the motion when it was renewed at trial.

HEARINGS & TRIAL, pp. 4-9.

The statutory language regarding "a written or recorded statement made by the defendant to a public servant engaged in the law enforcement activities or to a person then acting under his direction or in cooperation with him" is mandatory. Discovery must be ordered when such statement "is within the possession, custody or control of the district attorney, and is known by him to exist or should by the exercise of due diligence on his part become known to him to exist." CPL 240.20 (1 b).

The statements found by the Court to have been freely made by the defendant to the arresting officer and to the police agent, Lee, were crucial to the people's case. The denial of discovery of these statements, to the defendant made it impossible for him to prepare adequately his defense.

Wilson's First Petition For a Federal Writ of Habeas Corpus

Conclusion

In conclusion thereof it can truly be said, relator has been deprived of due process in complete derrogation of the 14th Amendment to the Constitution of the United States, wherein relator is unconstitutionally detained and deprived of his liberty in violation of the Constitution and Laws of the United States.

Wherefore, relator prays for the relief sought, in the interest of fundamental Justice and upon Constitutional grounds.

Respectfully Submitted,

/s/ (Illegible)
Relator-Petitioner Pro Se
135 State Street
Auburn, N.Y. 13022

Sworn to before me this
27th day of November, 1973

/s/ Elaine A. Graves
Elaine A. Graves
Signature of Notary Public

Elaine A. Graves
Notary Public, State of New York
(Illegible)
My Commission expires March 30, 1975

Order of Supreme Court, Bronx County, Denying Motion to Vacate Judgment

SUPREME COURT OF THE STATE OF NEW YORK

Part 60, County of Bronx

Indictment Number 2834/70

Motion For: CPL 440

The People of the State of New York,

against

Joseph Allan Wilson.

Present: Hon. Joseph Cohen, J.S.C.

	Papers numbered
Notice of Motion and Affidavit Annexed	1-3
Answering Affidavits	6-7
Stenographer's Minutes	4-5
People's Memo of Law	8
People's Exhibits	1-2

Upon the foregoing papers this motion is denied. The issue was previously raised on appeal and cert. was denied by the U.S. Supreme Court in 1979. Furthermore, in *U.S.* v. *Henry,* 447 U.S. 264 (1980) relied on by defendant the cellmate was a paid government agent. In any event *Henry* is not retroactive as to this defendant (*People* v. *Pepper,* 53 N.Y.2d 213).

Opinion filed,
Dated: 11/20/1981

/s/
J.S.C.
Joseph Cohen

Wilson's Second Petition For a Federal Writ of Habeas Corpus

FORM FOR USE IN APPLICATIONS
FOR HABEAS CORPUS UNDER 28 U.S.C. §2254

Name JOSEPH ALLAN WILSON

Prison Number #72-A-0426 A-10/26

Place of Confinement Auburn Correctional Facility
Auburn, New York

United States District Court, Southern District
of New York

Case No. (Illegible)

(To be supplied by Clerk of U.S. District Court)

JOSEPH ALLAN WILSON, PETITIONER

(Full name) (Include name under which
you were convicted)

v.

HON. ROBERT HENDERSON, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized
person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

HON. ROBERT ABRAMS, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future,* petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

Wilson's Second Petition For a Federal Writ of Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS—READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis,* in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis,* you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $....., you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge

judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is .....

.....

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Supreme Court of the State of New York, Bronx County
2. Date of judgment of conviction April 20, 1972
3. Length of sentence 20 years Sentencing judge Hon. Edward T. McCaffrey
4. Nature of offense or offenses for which you were convicted:

   murder

   possession of a weapon as a felony
5. What was your plea? (Check one)

   (a) Not guilty (x)
   (b) Guilty ( )
   (c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: .....

.....

6. Kind of trial: (Check one)
   (a) Jury (x)
   (b) Judge only ( )
7. Did you testify at the trial? (Yes) No (x)
8. Did you appeal from the judgment of conviction? Yes (x) No ( )
9. If you did appeal, answer the following:
   (a) Name of court Appellate Division of the Supreme Court, First Department
   (b) Result Leave to appeal denied
   (c) Date of result April 23, 1973

   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: Petitioner filed a petition for certiorari to the United States Supreme Court on April 30, 1979. The petition was denied without opinion. 442 U.S. 945 (1979).
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with repect to this judgment in any court, state or federal? Yes (x) No ( )
11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of court United States District Court, Southern District of New York
        (2) Nature of proceeding Habeas corpus petition
        (3) Grounds raised (a) a denial of petitioner's motion to dismiss the indictment against him for failure to proscute violated the U.S. Constitution and laws of N.Y., (b) admission at

trial of petitioner's statements to the arresting officer violated the U.S. Constitution; (c) admission at trial of petitioner's statements to his cellmate, a conceded police agent, violated the U.S. Constitution; (d) the state court erred in failing to rule upon or grant petitioner's motion for discovery pursuant to CPL 240.20

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (x)

(5) Result Petition denied

(6) Date of result January 7, 1977

(b) As to any second petition, application or motion give the same information:

(1) Name of court United States Court of Appeals for the Second Circuit

(2) Nature of proceeding Appeal from denial of petition

(3) Grounds raised (a), (b) and (c) as stated in answer (a)(3) above

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (x)

(5) Result Denial of petition affirmed

(6) Date of result September 20, 1978

(c) As to any third petition, application or motion, give the same information:

(1) Name of court United States Court of Appeals for the Second Circuit

(2) Nature of proceeding Motion for rehearing or rehearing en banc

(3) Grounds raised (a) and (b) as stated in answer (a)(3) above

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (x)

(5) Result Rehearing and rehearing en banc denied

(6) Date of result January 23, 1979

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes (x) No ( )

(2) Second petition, etc. Yes (x) No ( )

(3) Third petition, Yes (x) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: .....

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief.

Wilson's Second Petition For a Federal Writ of Habeas Corpus

You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the naure of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

Wilson's Second Petition For a Federal Writ of Habeas Corpus

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: *The admission of trial of petitioner's statements to his cellmate, a conceded police agent, violated petitioner's Sixth and Fourteenth* Amendment right.

Supporting Facts (tell your story *briefly* without citing cases or law): Following his arrest and arraignment, petitioner was placed in a detention cell, which overlooked the scene of petitioner's alleged crime, with one Benny Lee. Lee had agreed with the detective who had arrested petitioner to act as an informant. In the absence of his retained counsel, petitioner was induced by Lee to make certain statements to Lee concerning his participation in the alleged crime. Lee reported these statements to the detective and later testified at petitioner's trial as to said statements.

(See accompanying memorandum for a more complete statment of supporting facts).

B. Ground two: .....

Supporting Facts (tell your story *briefly* without citing cases or law): .....

C. Ground three: .....

Supporting Facts (tell your story *briefly* without citing cases or law): .....

.....

D. Ground four: .....

Supporting Facts (tell your story *briefly* without citing cases or law): .....

Wilson's Second Petition For a Federal Writ of Habeas Corpus

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: .....

.....

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing Alfred H. Adler, Esq., 445 Park Avenue, New York, New York (by assignment)
    (b) At arraignment and plea (same)
    (c) At trial (same)
    (d) At sentencing (same)
    (e) On appeal (same)
    (f) If any post-conviction proceeding Jeffrey Zuckerman, Esq. (currently with Antitrust Div., U.S. Dept. of Justice, Wash., D.C.); Richard Lyon, Esq.*
    (g) On appeal from any adverse ruling in a post-conviction proceeding: (same)

16. Were you sentenced on more than one count of an indictment, or more than one indictment, in the same court and at the same time? Yes (x) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (x)

* (currently with Anaconda-Ericsson, Stamford, Ct.).

Wilson's Second Petition For a Federal Writ of Habeas Corpus

(a) If so, give name and location of court which imposed sentence to be served in the future: .....

.....

(b) And give date and length of sentence to be served in future: .....

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 2, 1982
(Date)

JOSEPH ALLAN WILSON

by IDA C. WURCZINGER
(Signature)

IDA C. WURCZINGER

Signature of Attorney
(if any)

Memorandum in Support of Wilson's Second Petition For a Federal Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 5186 (RLC)

JOSEPH ALLAN WILSON,

Petitioner,

against

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent.

MEMORANDUM IN SUPPORT OF WILSON'S

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Joseph Allan Wilson submits this Memorandum in support of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, or in the alternative, for an order vacating the prior judgment of this Court pursuant to Federal Rule of Civil Procedure 60(b)(6), and granting his original petition for a writ of habeas corpus.

STATEMENT OF THE CASE

Wilson is presently incarcerated in the Auburn Correctional Facility in Auburn, New York, serving a sentence of twenty years to life on a murder conviction and a concurrent term of up to seven years for possession of a weapon as

a felony entered by the Supreme Court of the State of New York, Bronx County, on May 18, 1972. The following facts are undisputed.

Wilson's Arrest and Arraignment

On July 8, 1970, Wilson voluntarily surrendered himself to Detective Cullen and Dunn of the New York Police Department after having learned that he was sought by the police in connection with the July 4, 1970, robbery of the Star Taxicab Garage ("Star") and the shooting of the Star dispatcher on duty. (Transcript of "*Huntley* hearing" at 61, annexed as Exhibit A to the Affirmation of Ida C. Wurczinger,* subscribed to July 2, 1982.) Wilson was told that he was under arrest. Then, after Detective Dunn left the room, Wilson told Detective Cullen that he had been at Star looking for his brother, had heard shots, and had run because he "was afraid [he] would be blamed." (Ex. A at 27-29). Wilson was arraigned and counsel was assigned to represent him on July 9, 1970.

The State's Use of an Undisclosed Police Informant

On July 13, 1970, four days after Wilson had been sent to the Bronx House of Detention, he was transferred to a cell that overlooked Star—the scene of his alleged crimes. Wilson's cellmate was one Benny Lee, a prisoner who had been transferred to that cell after he had agreed, pursuant to Detective Cullen's request, "to keep his ears open . . . if he was put in the same cell with [Wilson] . . . as to the other two perpetrators [of the Star robbery]." (Ex. A at 55-56.)

Initially, Wilson's statements to Lee concerning the robbery were essentially identical to what he told Detective

* All exhibits cited in this Memorandum refer to those annexed to the Wurczinger Affirmation, submitted in support of this motion.

Cullen. While Wilson was still visibly "upset about the fact that he [had been] moved from one cell upstairs to another that faced [the Star] garage. . . .", Lee told petitioner "that the story wasn't—it didn't sound too good." (Ex. A at 57-58.) A few days later, Wilson, unaware that Lee was a government informant, told Lee that he had planned and executed the robbery with two other men. (Ex. A at 60.) Lee, who had been making notes of his conversations with Wilson (Ex. A at 66), reported this statement to Detective Cullen. (Ex. A at 72.)

Pretrial Suppression Motion

Wilson moved prior to trial to suppress his statements to Lee. After a "*Huntley* hearing," the trial court denied the motions (Ex. A at 141-144) based upon its finding that the statements "were spontaneous and not as a result of any interrogation by Lee."

Wilson's Trial and Conviction

At Wilson's trial, Lee testified as to Wilson's statements to him concerning the Star robbery. (Petition for Writ of Habeas Corpus at 3, annexed as Exhibit B to Wurczinger Aff.) At the conclusion of the trial, on April 20, 1972, the jury found Wilson guilty of murder and possession of a weapon as a felony. (Ex. B at 1.) On May 18, 1972, he was sentenced to a prison term of twenty years to life on the murder conviction and to a concurrent term not to exceed seven years on the weapons conviction. (*Id.*) On April 23, 1973, the Appellate Division affirmed Wilson's conviction and leave to appeal to the New York Court of Appeals was denied. (Ex. B at 2.)

Wilson's Initial Application for Habeas Corpus Relief

Wilson filed his initial petition for the writ of habeas corpus, *pro se,* in the United States District Court for the Southern District of New York on December 7, 1973. (*See* Ex. B.) One of Wilson's major arguments was that the trial Court had admitted his statements to Lee improperly because they had been obtained through methods that violated his constitutional rights. (Ex. B at 10-11.) The State's response and Wilson's reply were filed on March 25, 1974. On January 7, 1977, the District Court issued its decision denying the petition on the ground, *inter alia,* that "there was no interrogation" by Lee and that Wilson's statements were thus "spontaneous." (*Wilson* v. *Henderson,* No. 73-5186, slip op. at 8 (S.D.N.Y. Jan. 7, 1977), annexed as Exhibit C to Wurczinger Aff.)

The Court of Appeals affirmed by a divided vote, with Judge Oakes dissenting on the Sixth Amendment claim, *inter alia. Wilson* v. *Henderson,* 584 F.2d 1185 (2d Cir. 1978). The Court of Appeals subsequently denied rehearing and rehearing *en banc,* although three Circuit Judges (out of nine) voted to grant rehearing *en banc* to reconsider whether reversal of the holding as to Wilson's statements to Lee was required by *Massiah* v. *United States,* 377 U.S. 201 (1964). Judge Oakes noted that the issue had recently been decided "directly contrary to the panel majority in this case" in *Henry* v. *United States,* 590 F.2d 544 (4th Cir. 1978). *Wilson* v. *Henderson,* 590 F.2d 408, 409 (2d Cir. 1979). Wilson's petition for *certiorari* was denied without opinion. 442 U.S. 945 (1979).

The Supreme Court's Decision in Henry

Shortly after the Supreme Court's denial of Wilson's *certiorari* petition, the Court granted *certiorari* in the case of *Henry* v. *United States,* 590 F.2d 544 (4th Cir. 1978).

The Court affirmed the Fourth Circuit decision holding that incriminating statements elicited from an indicted, in-custody defendant by his cellmate who was an undisclosed government informant could not be used at trial because the statements were obtained in violation of the defendant's constitutional right to counsel. *United States* v. *Henry*, 447 U.S. 264 (1980).

The Supreme Court expressly rejected the contention that a finding of "interrogation" by the government informant was a necessary element of a violation of the accused's Sixth Amendment right to counsel under *Massiah*. *Henry*, 447 U.S. at 271. It also held that "the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the government." *Henry*, 447 U.S. at 273.

Wilson's Exhaustion of State Court Remedies

On September 11, 1981, Wilson filed a motion in the Supreme Court of the State of New York, Bronx County, for an order pursuant to section 440.10 of the New York Criminal Procedure Law vacating the judgment of conviction entered against him. By an order, dated November 20, 1981, that court denied Wilson's motion, stating in full (citation omitted):

> The issue was previously raised on appeal and cert. was denied by the U.S. Supreme Court in 1979. Furthermore, in *U.S.* v. *Henry*, 447 U.S. 264 (1980) relied on by defendant the cellmate was a paid government agent. In any event *Henry* is not retroactive as to this dedendant.

(Order, dated November 20, 1981, annexed as Exhibit D to Wurczinger Aff.) Wilson's motion in the Appellate Division of the Supreme Court, First Department, for leave to appeal the November 1981 order was denied on January 19, 1982. (Certificate Denying Leave, dated January 19, 1980 (sic), annexed as Exhibit E to Wurczinger Aff.)

Argument

I.

Henry should be applied retroactively to vindicate Wilson's right to counsel.

The only issue before the Court is whether Wilson should have the benefit of the Supreme Court's decision in *Henry*. That decision established a right to counsel under a new set of circumstances that are present here. Furthermore all relevant considerations militate for the retroactive application of the new rule to *Wilson*.

First, *Henry* changed the law. At least two members of the Court considered the *Henry* rule to constitute "a new *Massiah* test" and a deviation from the principles followed in a recent Supreme Court decision dealing with the Sixth Amendment right to counsel, *Brewer* v. *Williams*, 430 U.S. 387 (1977). See Henry, 447 U.S. at 279-89 (Blackmun, J., and White, J., dissenting); *see also Cahill* v. *Rushen*, 501 F. Supp. 1219, 1225 (E.D. Cal. 1980) ("The Court dispelled much of the confusion engendered by *Brewer* this last term in *United States* v. *Henry*. . . ."). Given that "[t]he doctrinal underpinnings of *Massiah* [had] been largely left unexplained" prior to *Henry*, 447 U.S. at 290 (Rehnquist, J., dissenting) and that two Circuit Courts, on the basis of substantially similar facts, had come to conflicting conclusions concerning the applicability of *Massiah*, it is clear that *Henry* made new law.

Second, *Henry* plainly controls this case. Each of the three critical factors in that case is also present here: "First, [the person to whom the incriminating statements had been made] was acting under instructions as a paid informant for the government; second [he] was ostensibly no more than fellow inmate of [the accused]; third, [the accused] was in custody and under indictment at the time he was engaged in conversation by [the government agent]." 447 U.S. at 270.* All who have compared Wilson's case with *Henry* have noted that the two cases are indistinguishable. *Henry,* 447 U.S. at 281 (Blackmun, J., dissenting); *Wilson* v. *Henderson,* 590 F.2d 408, 409 (2d Cir. 1978) (Oakes, J., dissenting); *Henry* v. *United States,* 590 F.2d 544, 553 (4th Cir. 1978) (Russell, J., dissenting); *United States* v. *Sampol,* 636 F.2d 621, 637-638 (D.C. Cir. 1980). If anything, the "psychological inducements," "pressures," and "subtle influences" of confinement (*Henry,* 447 U.S. at 274) bore more forcefully upon Wilson who was placed in a cell that overlooked the very scene of the crimes.

Third, each of the three factors governing retroactivity favors retroactive application of *Henry* here. They are: 1) The purpose to be served by the new constitutional rule, 2) the extent to which law enforcement authorities had relied upon the prior law, and 3) the effect of retroactive application on the administration of justice. *Desist* v. *United States,* 394 U.S. 244, 249 (1969); *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967).

"Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist,* 394 U.S. at

* The fact that Henry had been indicted while Wilson had only been arraigned does not distinguish this case from *Henry.* Under federal law, a criminal defendant's right to counsel attaches on arraignment or even before. *Brewer* v. *Williams,* 430 U.S. 387, 398-399 (1977).

249. *Henry* changed the law with regard to the protections of the Sixth Amendment right to counsel—an area of constitutional law where the justification for retroactive application is strongest because the purpose underlying these protections is to ensure "the fairness of the trial—the very integrity of the fact-finding process." *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965). *See also Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Douglas* v. *California,* 372 U.S. 353 (1963); and *Hamilton v. Alabama,* 368 U.S. 52 (1961). "The right to counsel at the trial, . . . on appeal . . . and at other 'critical' stages of the criminal proceedings . . . have all been made retroactive, since the 'denial of the right must almost invariably deny a fair trial.'" *Arsenault* v. *Massachusetts,* 393 U.S. 5, 6 (1968) (per curiam) (citations omitted.* Given that this important purpose underlies the change in law enunciated in *Henry,* retroactivity is appropriate.

Considerations surrounding law enforcement officials' reliance or prior law compel the same conclusion. The *Henry* decision did not mandate any change in the ordinary pretrial procedures followed by law enforcement officials. *Compare United States* v. *Wade,* 388 U.S. 218 (1967). Rather, *Henry* prohibits an extraordinary abuse of the custodial advantage. In *Henry,* the Court established the Sixth Amendment right to counsel in a narrowly-defined set of circumstances, therefore retroactive application of *Henry* will not invalidate widespread police procedures previously believed necessary to the expeditious arrest and

* By contrast, the new rules for the conduct of custodial interrogations established in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) and *Miranda* v. *Arizona,* 384 U.S. 436 (1966) have not been applied retroactively because "the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination" and they encompass situations where the right to a fair trial is not invariably implicated. *Johnson* v. *New Jersey,* 384 U.S. 719, 729-730 (1966).

conviction of suspects. It will serve simply to rectify a now apparent violation of civil rights perpetrated in the over-zealous pursuit of a confession.

The effect of the retraoctive application of *Henry* upon the administration of justice will similarly be minimal. The holding of *Henry* is very narrow, focusing on a concatenation of three particular facts: 1) A government informant, 2) acting in the guise of a fellow inmate, 3) while both are in custody, elicits damaging evidence that leads to the accused's conviction. The exoneration of those now laboring under convictions unfairly obtained on the basis of evidence gathered in this unique way can hardly cause the widespread distress of the criminal justice system.

The Supreme Court's *Henry* decision comes late, but not too late to vindicate Wilson's right to counsel. The new rule crafted by the Supreme Court in *Henry* for facts virtually identical to those of tnis case calls for relief for Wilson.

II.

The Court should grant Wilson's new habeas corpus petition or vacate its prior judgment and grant his original petition.

In light of *Henry* two aveues exist by which the Court may provide relief for Wilson. Under 28 U.S.C. § 2254(b), it may grant Wilson's new habeas corpus petition. Alternatively, under Federal Rule of Civil Procedure 60(b)(6), the Court may vacate its prior judgment, which denied Wilson's original petition, to reconsider that petition and grant Wilson habeas corpus relief.

The Court's *Henry* decision presents a ground under 28 U.S.C. § 2244(b) that requires consideration of Wilson's new petition for habeas corpus relief. *See St. Pierre* v.

Helgemoe, 545 F.2d 1306 (1st Cir. 1976); *Vanhook* v. *Craven,* 419 F.2d 1295 (9th Cir. 1969); and *Alford* v. *North Carolina,* 405 F.2d 340 (4th Cir. 1968), *reversed on other grounds,* 400 U.S. 25 (1970). Wilson has efficiently and diligently exercised his right to petition for habeas corpus relief on a theory that the Supreme Court has now expressly adopted. Had he "slept on his rights" until the present time and then exercised them, Wilson would certainly be entitled to habeas corpus relief. Refusing to grant his new application would be manifestly unjust on the facts of this case because it "would produce an anomaly whenever the rights of accused persons were expanded by the courts: state prisoners who had slept on their rights would go free, while those who had been diligent would be barred from federal relief." *St. Pierre,* 545 F.2d at 1308.

Alternatively, the Court should reconsider and grant relief pursuant to Wilson's original habeas corpus petition. Federal Rule of Civil Procedure 60(b)(6) empowers this court to vacate its prior judgment which denied that petition, "whenever such action is appropriate to accomplish justice." *Klapprott* v. *United States,* 335 U.S. 601, 614-615 (1949). This court has held that where a change in the law reverses the rationale underlying its previous dismissal of a legal claim, the interests of justice require that its previous judgment be vacated and that the claimant be afforded an opportunity to have his day in court. *See Tsakonites* v. *Transpacific Carriers Corp.,* 322 F. Supp. 722 (S.D.N.Y. 1970).

The holding of *Henry* represents a change in the law that undermines the basis for this Court's earlier rejection of Wilson's petition. All courts that considered Wilson's Sixth Amendment claim reasoned that the government informant to whom the incriminating statments were made did not interrogate Wilson and hence that Wilson's

statements to Lee were voluntary. *See Wilson* v. *Henderson,* No. 73-5186, slip op. at 8 (S.D.N.Y. Jan. 7, 1977); *Wilson* v. *Henderson,* 584 F.2d 1185, 1190 (2d Cir. 1978). *Henry* makes clear, however, that that is not the proper inquiry.

Wilson is therefore entitled to an opportunity to have a court consider the contention which lies at the core of his Sixth Amendment claim, that, despite the absence of interrogation, his statements to Lee were deliberately elicited in the absence of his retained counsel and hence were introduced at trial in violation of his Sixth Amendment rights. The interests of justice warrant, if not compel, that this Court grant Wilson's new petition or vacate its prior judgment and grant his original petition in order to afford Wilson the opportunity to have his Sixth Amendment contention considered on its merits.

Conclusion

For the foregoing reasons, in light of *Henry,* this Court should grant Wilson's new application for a writ of habeas corpus, or vacate its previous judgment and grant Wilson's original habeas corpus petition, and grant such other and further relief as it may deem just and proper.

New York, New York
July 2, 1982

Respectfully submitted,

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(3)

No. 84-1479

IN THE

Supreme Court of the United States

October Term, 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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Questions Presented

1. Whether, in the absence of an intervening change in the law or any other compelling factor, principles of finality of habeas corpus litigation preclude a federal court from reconsidering an issue that has been fully adjudicated by the federal district and appellate courts pursuant to a previous petition for a writ of habeas corpus.

2. Whether repetitious federal review of an issue raised in a successive petition by which a person in state custody challenges a final state judgment necessarily fails to serve the "ends of justice" where, pursuant to a previous petition for a writ of habeas corpus, the same issue received plenary consideration, was fully adjudicated by the federal district and appellate courts and was found by this Court not to warrant a writ of certiorari; where there has been no intervening change in the law; where the claimed constitutional error does not give rise to a substantial question as to the validity of the determination of guilt; and where no other compelling factors have been identified or established.

3. Whether a judgment of the Court of Appeals for the Second Circuit must be vacated where, without applying the presumption of correctness mandated by 28 U.S.C. § 2254 (d) and without complying with the requirement, announced by this Court in *Sumner* v. *Mata*, 449 U.S. 539 (1981), to explain in writing why one of the exceptions enumerated in § 2254(d) was deemed applicable, the Court of Appeals relied upon its own findings of fact, which are contrary to those of a state hearing court as well as to those of two federal district courts and a majority of a prior panel of the same Court of Appeals.

4. Whether the presumptively correct state court finding that Wilson's inculpatory jailhouse statement to an un-

disclosed government agent was spontaneous and not deliberately elicited—a finding supported by direct and uncontradicted hearing testimony regarding the circumstances surrounding the statement—negates the inference of deliberate eliciting that, under *United States* v. *Henry*, 447 U.S. 264 (1980), might be drawn in the absence of such direct evidence.

5. Whether, if *United States* v. *Henry*, 447 U.S. 264 (1980), represented a change in the law sufficient to warrant the Second Circuit's reversal of its own prior judgment, it should be deemed a new rule of law and should not be applied retroactively in a habeas corpus proceeding.

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (Pet. App. A., pp. 1a-20a) is reported at 742 F.2d 741 (2d Cir. 1984). The opinion of the District Court (Pet. App. C, pp. 23a-29a) is not reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 27, 1984. A timely petition for rehearing with a suggestion for rehearing en banc was denied on December 17, 1984 (Pet. App. B, pp. 21a-22a). The petition for a writ of certiorari was filed on March 18, 1985, and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Sixth and Fourteenth Amendments to the United States Constitution, United States Code, Title 28, sections 2244(b) and 2254(d), and Rule 9(b) of the Rules Governing United States Code, Title 28, section 2254 (Pet. pp. 2-5).

Statement of the Case

This case arises from Joseph Allan Wilson's second petition for a writ of habeas corpus, in which he asserted, as he had in his first petition, that the introduction, at his state court murder trial, of a statement he made to a cellmate violated his Sixth Amendment right to counsel. Although both the District Court and the Court of Appeals had rejected Wilson's constitutional claim upon his first petition, and this Court had denied a petition for a writ of certiorari, Wilson asserted that this Court's decision in *United States* v. *Henry*, 447 U.S. 264 (1980), changed the law regarding such statements and that it was retroactively applicable to Wilson's case. The District Court denied the petition based upon its determination that Wilson's case was factually distinguishable from *Henry*. The Court of Appeals, while rejecting Wilson's theory that *Henry* changed the law, nonetheless reconsidered his claim, found that the facts of the present case were not distinguishable from those of *Henry*, held that its own prior decision was incorrect, and reversed the District Court's order.

1. In the early morning of July 4, 1970, Joseph Allan Wilson and two others committed a robbery at the Star Taxicab Garage, during which Sam Reiner, the sixty-five-year-old night dispatcher, was shot and killed. Shortly before the murder, three Star employees observed Wilson, who, approximately a year and a half earlier, had been discharged from a job at the garage, and whose brother worked there at the time of the crime, on the garage premises; two of them saw him conversing at length with his two accomplices and one observed him spend approximately twenty minutes reconnoitering the various rooms of the garage (Tr. 209-10,

216-17, 268-275, 278, 297-303, 310-12, 415). While Wilson and his accomplices were on the premises, Joshua Deutsch, one of the Star employees, spoke briefly with Sam Reiner in the dispatcher's office (Tr. 448-49). Some moments later, from the front of the drivers' waiting room, he saw Wilson's two companions fleeing with money in their arms (Tr. 453-55). Mr. Deutsch then looked into the dispatcher's office, where he saw Sam Reiner lying on the floor, amid scattered money, with blood trickling from his mouth (Tr. 457-58). The office telephone was dangling from its hook (Tr. 330-31, 467-68).*

Mr. Deutsch ran to the body shop and told George Allen, another Star employee, what he had seen; seconds later, the two employees ran back toward the dispatcher's office (Tr. 322, 324-26, 461-63). As they did, they saw Wilson fleeing from the dispatcher's office cradling loose money in his arms (Tr. 326-28, 463). As he ran past them, Wilson said, "Keep cool. I've left something on the floor for you" (Tr. 328, 464).

Upon his arrest, four days later, Wilson admitted to Detective Walter Cullen that he had been at the scene of the crime and that he had fled along with the other two men after the shooting. He claimed, however, that he had merely been a bystander and that the perpetrators were strangers to him (Tr. 369-78).

2. On July 7, 1970, prior to Wilson's arrest, Detective Walter Cullen spoke to Benny Lee, an inmate at the Bronx House of Detention, who was being held on a charge of Robbery in the Third Degree (JA. 43). Detective Cullen told Lee that he expected to arrest Wilson shortly for a crime perpetrated by three individuals and "asked Mr. Lee if he would be willing to keep his ears open, not to inquire, or to question this defendant if he was put in the same cell with

* Apparently because of the loud noise generated by the garage air compressors, which were in constant operation (Tr. 233, 336, 350-56, 473-79), no witnesses heard the sound of gunshots. The medical examiner's subsequent autopsy disclosed that Sam Reiner had suffered two .22 calibre bullet wounds to the left side of his chest (Tr. 565-68).

him, but more or less to keep his ears open as to the other two perpetrators'' (JA. 24, 37). Lee indicated that he understood the nature of the request and, without receiving any promise of compensation or leniency from Detective Cullen, agreed to provide the requested assistance (JA. 37, 43, 45-46).

Shortly thereafter, Wilson, having been arrested and arraigned, was assigned to Lee's cell, which was in an area from which the nearby Star Taxicab Garage was visible (JA. 38). Upset by the view, Wilson began discussing his pending charges with Lee and asserted, consistently with his previous exculpatory statement to Detective Cullen, that he had observed two strangers commit the robbery and murder and that he had simply picked up some money that they dropped (JA. 38-39). Although Lee remarked that the story ''didn't sound too good'' and that ''things didn't look too good'' for Wilson, Wilson ''stuck to the story'' and maintained that it was an accurate account of what had happened (JA. 39).

Several days later, Wilson was visited by his brother, who conveyed to Wilson that their family was distraught over his role in the killing of Sam Reiner (JA. 41-42). Lee observed that ''this upset him very much and that would start him to talking about different things, about the crime and different things'' (JA. 42). During the ensuing two days, Wilson gradually changed his version of the crime until, ultimately, he told Lee that, being familiar with the layout of the Star Taxicab Garage and knowing that it would be a vulnerable target over the weekend, he had planned the robbery with the two other men (JA. 40). After describing how he had ''cased'' the premises and then ushered in his companions, Wilson admitted to Lee that ''[w]e shot the man'' and that afterwards, ''[w]e picked up the money and left'' (JA. 40).

During the entire period of nine to ten days that he and Wilson shared a cell, Lee never posed questions to Wilson in an effort to uncover information (JA. 39-40, 42). All of

the statements recounted in Lee's testimony were initiated by Wilson (JA. 42).

3. Pursuant to *People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), the state court, in 1972, conducted a hearing to determine the admissibility at trial of Wilson's statements. Based on its findings that Benny Lee was instructed not to ask questions, but merely to listen to Wilson, that Lee adhered to those instructions, and that Wilson's utterances in Lee's presence were spontaneous, unsolicited and voluntary, the court determined that Wilson's constitutional rights had not been violated and that his statements to Lee would be admissible at trial (JA. 62-63). After the trial, at which the statements were introduced, the Supreme Court of the State of New York, Appellate Division, First Department, unanimously and without opinion, affirmed Wilson's conviction. *People* v. *Wilson*, 41 A.D.2d 903, 343 N.Y.S.2d 563 (1st Dept. 1973). The Court of Appeals of the State of New York denied Wilson's application for leave to appeal.

4. In his original petition for a writ of habeas corpus, Wilson claimed that the admission at trial of his statements to Lee violated his constitutional rights (JA. 115, 125-27). On January 7, 1977, the District Court for the Southern District of New York, after citing *Massiah* v. *United States*, 377 U.S. 201 (1964), rejected this claim because ''[t]he record indicates that there was no interrogation whatsoever by the undercover agent only spontaneous statements offered by petitioner'' (Pet. App. D, p. 32a). On his appeal from the District Court's order denying his petition for a writ of habeas corpus, Wilson, who was represented by counsel, again argued that the statements to Lee were deliberately elicited in violation of *Massiah*. The Court of Appeals for the Second Circuit, by a two-judge majority, rejected that claim, holding that ''there must be some circumstance more than the mere absence of counsel before a defendant's post-indictment statement is rendered inadmissible.'' *Wilson* v. *Henderson*, 584 F.2d 1185, 1190 (2d Cir. 1978) (Pet. App. E, p. 38a). The court distinguished Wilson's case from

Brewer v. *Williams*, 430 U.S. 387 (1977), in which this Court found that a detective deliberately elicited incriminating statements even though he did not interrogate the defendant, because "Lee did not interrogate Wilson, *nor in any way attempt to deliberately elicit incriminating remarks . . .*". 584 F.2d at 1191 (Pet. App. E, pp. 40a-41a). (emphasis added). A subsequent application for a rehearing en banc was denied, *Wilson* v. *Henderson*, 590 F.2d 408 2d Cir. 1979) (Pet. App. F, pp. 46a-47a), and this Court denied a petition for a writ of certiorari. *Wilson* v. *Henderson*, 442 U.S. 945 (1979).

5. Commencing in 1981, a new round of litigation regarding the constitutionality of Wilson's statement to Lee followed in the wake of *United States* v. *Henry*, 447 U.S. 264 (1980), *aff'g*, 590 F.2d 544 (4th Cir. 1978), in which this Court affirmed the Fourth Circuit's decision—which had been published prior to the denial of Wilson's suggestion for rehearing—holding that, under the circumstances of that case, a government agent's jailhouse conversation with the accused constituted "deliberate elicitation" in violation of the principles announced in *Massiah*. After a New York State court found, on November 20, 1981, that *Henry* was factually distinguishable from Wilson's case, that *Henry* should not be applied retroactively, and, therefore, that it did not support Wilson's motion for post-judgment relief (JA. 129), and after Wilson's application for further state appellate review was denied, he filed, in 1982, a second petition for a writ of habeas corpus (JA. 130-50). As before, Wilson claimed that his statements to Lee were deliberately elicited in violation of the Sixth Amendment (JA. 137). His claim that he was entitled to relief on that previously rejected ground was premised solely on his theory that "*Henry* changed the law" (JA. 145) by creating a new test for determining when a statement is "deliberately elicited" and thereby rendered invalid the prior determination that the statements were obtained constitutionally (JA. 149-50).

In opposition, the State argued that *Henry* did not alter the constitutional principles and standards that were ap-

plied when Wilson's original petition was adjudicated and, therefore, that his successive petition on identical grounds should be dismissed pursuant to 28 U.S.C. § 2244(b); that the present case is factually distinguishable from *Henry*; and that, if *Henry* did promulgate a new constitutional rule, it should not be applied retroactively.

In an opinion issued on March 30, 1983, the District Court did not address the contention that Wilson's successive petition should be dismissed pursuant to 28 U.S.C. § 2244(b), but proceeded to the merits of Wilson's claim. Because "[t]he testimony at the *Huntley* hearing established that petitioner's initial false exculpatory statements to Lee were a spontaneous response to petitioner's view of the Star Taxicab Garage from his cell window, and that petitioner's ultimate confession to Lee was a spontaneous response to a disturbing visit petitioner received from his brother," the District Court found that the record supported the state court's finding that Wilson's statements were spontaneous and, therefore, accorded that finding the presumption of correctness as required by 28 U.S..C § 2254 (Pet. App. C, p. 28a). And, because that finding negated the inference that Lee affirmatively secured statements, the District Court found that Wilson's case was distinguishable from *Henry* and dismissed the petition.

On August 27, 1984, a two-judge majority of the Court of Appeals for the Second Circuit declared that, "notwithstanding that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the 'ends of justice' require a consideration of the merits of his present application" (Pet. App. A, p. 6a). Without any reference to the District Court's finding that the confession was a response to the disturbing visit by Wilson's brother, the Court of Appeals rejected both the District Court's conclusion that *Henry* was distinguishable and, implicitly, the underlying state court finding that Wilson's statements were spontaneous (Pet. App. A, pp. 9a-10a). Finally, the panel majority concluded that, although *Henry* worked so substantial a change in Sixth

Amendment analysis that it warranted the invalidation of the prior decision of the Court of Appeals, it did not establish a "new" constitutional rule for purposes of determining whether it should be applied retroactively (Pet. App. A, pp. 12a-16a). The majority thereupon reversed the District Court's order.

Summary of Argument

I. On July 4, 1970, Joseph Allan Wilson, and two accomplices who were never apprehended, murdered Sam Reiner during a robbery at the Star Taxicab Garage in The Bronx. Throughout the course of the subsequent federal habeas corpus proceedings, the "accuracy" of the state jury's verdict has never been challenged by Wilson. *See Solem* v. *Stumes*, 465 U.S. 638, 104 S. Ct. 1338, 1342-43 (1984). Nor could it be. In addition to the incriminating admissions made by Wilson to a jailhouse informant, which are the subject of the extensive constitutional litigation that has now brought the case before this Court, there was a wealth of compelling circumstantial evidence that firmly established Wilson's guilt (*see* pp. 2-3, *supra*). Thus, the dissenter in the Court of Appeals was surely justified in his observation that, even without the benefit of the incriminating statements made by Wilson to the informant, the evidence against Wilson was overwhelming, as the "police had . . . [Wilson] dead to rights" (Pet. App. 17a).

Yet, while there could be no serious question that Wilson murdered Sam Reiner, over the past fifteen years there has been an abundance of debate in both the state and federal courts as to whether Wilson's post-arraignment admissions of guilt to the jailhouse informer, Benny Lee, were "deliberately elicited" from Wilson in violation of his Sixth Amendment right to counsel under principles first articulated in *Massiah* v. *United States*, 377 U.S. 201 (1964). During the many years of successive legal proceedings, which came before the recent, second appeal to the Court of Appeals, Wilson was afforded (and he does not claim

otherwise) no less than six full and fair opportunities to litigate the merits of his Sixth Amendment claim in the state and federal courts, including an earlier habeas corpus appeal heard by a different Court of Appeals panel.* *See* pages 5-8, *supra*. Common to the rulings that expressly declared Wilson's constitutional argument to be meritless were specific determinations by those courts that there had been no "deliberate elicitation" of the admissions by the jailhouse informant, who had been instructed to refrain from questioning Wilson about the crime, and only to listen to Wilson for the sole purpose of learning the identities of the two accomplices. Furthermore, Wilson's self-incriminating statements, which followed a distressing visit by Wilson's brother, were found by those courts to be "spontaneous" (Pet. App. C, p. 28a; D, p. 32a), "completely unsolicited" (Pet. App. E, p. 41a), and "voluntary" (Pet. App. E, p. 41a).

Eventually, however, on his second appeal to the Court of Appeals, Wilson found a forum that was more sympathetic to his constitutional argument. By a judgment issued more than 14 years after the murder of Sam Reiner, a divided panel of the Court of Appeals discovered what it perceived to be a Sixth Amendment violation, notwithstanding the court's contemporaneous conclusion that

* The courts that rejected Wilson's Sixth Amendment argument on the merits were: the state trial court at a pre-trial suppression hearing (1972); the state intermediate appellate court (1974) (unanimous affirmance without opinion); the federal district court on the first habeas petition (1977); a panel of the Court of Appeals on the first habeas petition (1978); the state court which considered a motion to vacate judgment (1981); and the federal district court on the second habeas petition (1983).

Additionally, four other courts refused to afford Wilson a discretionary, further review of the constitutional claim: a judge of the New York Court of Appeals who denied Wilson's application for permission to appeal to that court (1974); the full United States Court of Appeals, which denied an application for rehearing en banc following the first unsuccessful appeal (1979); this Court, which denied Wilson's petition for certiorari after his first habeas appeal (1979); and the state intermediate appellate court, which denied Wilson's application for permission to appeal from the denial of his motion to vacate judgment (1981).

Henry had not meaningfully changed the law from what it had been when the host of previous courts, including a prior panel of the Court of Appeals, had reached the opposite conclusion (Pet. App. A, 1a-16a). Thus, with one broad stroke the most recent Court of Appeals panel nullified not only Wilson's murder conviction and 20-years-to-life sentence, but also more than a dozen years of directly contrary judicial rulings that preceded it. Furthermore, the important factual determinations of "spontaneity," which underlay those rulings that the statements had not been "deliberately elicited," were simply disregarded. The state was directed to return to "square one" and belatedly start the prosecutorial process all over again—the state had to retry Wilson or release him (Pet. App. A, p. 16a). To justify this extreme result, the panel majority intoned, ironically, the words "ends of justice," which it drew from this Court's opinion in *Sanders* v. *United States,* 373 U.S. 1, 15, 16-17 (1963) (Pet. App. A, 6a).

Hence, the present case now calls for this Court to resolve an important and frequently recurring question of federal habeas corpus jurisprudence. Should a state prisoner who has had at least one full and fair opportunity to litigate the merits of a constitutional claim both in the state courts, during the criminal action, and in the federal courts, on habeas corpus, be allowed to persist in assailing the federal judiciary with successive identical habeas petitions, in the hope, and, as this case demonstrates, with the very real possibility that his second, third, fourth or some later bite at the federal habeas apple will find a court that is willing to exercise its discretion by entertaining the merits of the repetitive petition in order to serve what that court perceives to be the amorphous "ends of justice"? We urge the Court to answer that question in the negative, and rule instead that once a state prisoner has had one full and fair opportunity to be heard on the merits of his constitutional claim in a federal habeas corpus proceeding, the curtain of finality must ordinarily fall. Other federal courts subsequently confronted with the identical issue in a new habeas

corpus proceeding must consider themselves precluded from considering that issue on the merits unless the petitioner has presented newly-found material facts, or demonstrated that there has been an intervening change in the law that should be entitled to retroactive, collateral application in a habeas corpus proceeding. Put somewhat differently, absent such special circumstances, a federal court must consider itself without discretion to reconsider an identical claim already fully litigated by the state prisoner on the merits, in a prior federal habeas action, because the "ends of justice" can never warrant such an unreasonable and unnecessary perpetuation of the non-finality of a state criminal conviction.

Indeed, even if the Court were not inclined to accept this generalized rule of issue preclusion as appropriate for "pure" legal questions, at the very least then, previous federal determinations of questions of fact or mixed questions of law and fact, of the type so cavalierly disregarded by the recent Court of Appeals panel in this case, should not be subject to further litigation in subsequent habeas corpus proceedings. The law can change, or possibly be misinterpreted, but historic facts, once found after a full and fair consideration, can never change, absent the discovery of additional new facts which materially bear upon the correctness of the original factual determination.

Of course, we recognize that the declaration of a generally firm rule of issue preclusion for habeas matters involving state prisoners might appear to be, in some respects, inconsistent with dictum contained in *Sanders* v. *United States,* 373 U.S. at 18-19, and with some of the principles articulated in a few of the older habeas cases. *See, e.g., Salinger* v. *Loisel,* 265 U.S. 224, 230-231 (1924). But, strong support for the rule we propose is to be found in a number of this Court's cases decided during the two decades following *Sanders.* In the recent evolution of the Court's habeas corpus jurisprudence, it has been recognized that, notwithstanding the great deference to be paid to federal habeas corpus, the "Great Writ," equally compelling concerns about the great costs exacted by the writ—

the disruption of federal-state comity and principles of federalism, the increased burden placed on overtaxed judicial resources, the pressing needs for finality in state criminal cases and for consistency in federal decision making, and the ultimate miscarriage of justice that frequently attends the granting of the writ so long after conviction, making successful reprosecution of an obviously guilty defendant highly problematical—all militate against an unnecessarily "liberal allowance of the writ." *See, e.g. Engle* v. *Isaac,* 456 U.S. 107, 126-28 (1981); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 263-265 (1973) (Powell, J., concurring); *see, also, Barefoot* v. *Estelle,* 463 U.S. 880, 77 L.Ed.2d 1090, 1100-01 (1983).

Moreover, and perhaps of greater significance, the pronouncement of this rule of issue preclusion would be consonant with, and of aid in effectuating, the intent of Congress to limit, and bring more finality to, federal habeas litigation when, in 1966, three years after this Court's decision in *Sanders,* it amended 28 U.S.C. § 2244, the statute governing the availability of federal habeas corpus to state prisoners in successive petition situations, making the statutory "ends of justice" language construed in *Sanders* wholly inapplicable to state prisoners.

Yet, even if the Court were to allow for a continuation of the "ends of justice" approach to the evaluation of successive, identical claims, the result which we now urge, in the form of the new, qualified rule of issue preclusion, need not be refused. This Court, appropriately exercising its supervisory powers over the federal judiciary, may certainly require that a more objective, understandable standard be employed in determining whether the "ends of justice" might allow for the re-entertaining of a previously-rejected constitutional claim. Surely, something more than mere disagreement with the factual conclusions and constitutional analysis of an earlier bench of coordinate jurisdiction should be insisted upon before discretionary reconsideration of an otherwise final ruling may justifiably occur. Accordingly, we ask the Court to rule that, particularly in view of the Congressional motives underlying the

1966 amendment of 28 U.S.C. § 2244 and the constant federal-state frictions and problems emanating from habeas corpus review of state criminal judgments, a federal court would not be serving the "ends of justice" by granting discretionary merits reconsideration absent newly-found material facts, or the intervening promulgation of a new, retroactive principle of constitutional law. And, to effectuate this rule, the federal courts should be required to indicate, expressly, what objective bases of this sort are present in a particular case, warranting such merits reconsideration by a later habeas court.

Applying a rule of qualified issue preclusion to the circumstances of this case, the Court will see that the most recent Court of Appeals panel was unwarranted in entertaining the merits of Wilson's repetitive constitutional argument on his second appeal to that court, particularly in view of the Court of Appeals' own conclusion that, even with *Henry,* there had been no real change in the applicable law. And, certainly, the Court of Appeals' unjustified willingness to brush aside the factual determinations of the courts which preceded it can not be countenanced.

II. A state hearing court determined, after an evidentiary hearing, that Wilson's statements to Lee were spontaneous and unsolicited. Those findings of historical fact are entitled to a "high measure of deference" and, pursuant to 28 U.S.C. § 2254(d), must be presumed correct by a federal habeas court unless one of eight enumerated exceptions applies. Unlike all of the previous federal courts that had considered the hearing record in this case, however, the recent Court of Appeals panel failed to comply with the statutory mandate or with this Court's requirement that the reasons for deeming an exception applicable be articulated. Instead, the Court of Appeals relied on its own findings of fact which, in addition to disregarding the state court's findings, are largely at variance with the record.

The Court of Appeals based its legal conclusions on a scenario in which a detective, intent on gathering as much information from Wilson as he could, strategically played upon Wilson's emotions by exposing him to a view of the

scene of his crime and to a cellmate-informant, who bombarded him with a continuous barrage of psychologically subtle derision, which ultimately caused Wilson to grow so troubled that he admitted his guilt. These "facts" led to the Court of Appeals' determination that Wilson's statements were "the product of" his conversations with Lee and that this case was constitutionally indistinguishable from *United States* v. *Henry*, 447 U.S. 264 (1980). The uncontradicted hearing testimony, which underlies the state court finding of spontaneity, however, established that the detective's sole purpose in enlisting Lee's aid was to learn the identities of two unapprehended murderers and that Wilson incriminated himself, not as a result of any active efforts by Lee, but as a response to a disturbing visit in which Wilson's brother conveyed their family's outrage at Wilson's role in the murder of Sam Reiner.

In view of the facts supported by the record and reflected in the state court's findings, the present case is distinguishable from *Henry*, which turned on a factual conclusion that the government was responsible for the informant's deliberate efforts to secure incriminating information. Wilson's incriminating statements were not prompted by anyone connected to the state, but by his own brother. Moreover, here, in contrast to *Henry*, the state did not implicitly encourage the informant to induce incriminating statements by arranging to pay him only if he provided useful information. Thus, the facts of this case, unlike those of *Henry*, do not establish that the state "deliberately elicited" statements from a defendant in violation of his right to counsel.

Where, as here, an informant served solely as a passive listener, the constitutional right to counsel is not implicated. The historical concerns underlying the Sixth Amendment come into play only in those extra-judicial situations that entail a "trial-like confrontation" for which a defendant requires counsel to offset the government's adversarial advantage. Where the government informant's role is limited to listening to unsolicited utterances, there is no such confrontation. Thus, under the circumstances of the present case, no Sixth Amendment violation occurred.

ARGUMENT

POINT ONE

The Court of Appeals erred in granting Wilson habeas corpus relief where the identical claim had been rejected previously after he had been allowed a full and fair opportunity to litigate that claim on the merits in an earlier habeas proceeding before a different panel of the Court of Appeals, and where there had been no intervening change in the law entitled to retroactive application on habeas corpus and no presentation of any newly-found facts which might have had a material impact on the correctness of the original habeas determination.

A. In view of the 1966 congressional amendment of 28 U.S.C. § 2244, the dictum contained in this Court's earlier decision in *Sanders* v. *United States* should not be accepted as governing the disposition of successive, identical habeas corpus claims by state prisoners; the Court should announce and apply a new, qualified rule of issue preclusion, requiring that a successive, identical claim be summarily rejected, absent special circumstances that are not presented by the instant case.

1. The Court of Appeals rejected Wilson's argument that *United States* v. *Henry*, 447 U.S. 264 (1980), created new Sixth Amendment law of retroactive effect, entitling him to relief on a second habeas petition despite his having been completely unsuccessful previously when he presented the identical claim to the District Court and a different Court of Appeals panel on an earlier habeas petition (Pet. App. A, 12a-14a). The most recent panel agreed with the State's argument "that *Henry* merely applied the 'deliberately elicited' test of *Massiah* to new facts," and refused to read "*Henry* as establishing a 'likely to induce test' that fundamentally restructures *Massiah*" (*Id.* at 13a). Nevertheless, the Court of Appeals held that, "notwithstanding

that in his earlier petition Wilson advanced substantially the same ground for relief that he now advances, we conclude that the 'ends of justice' require a consideration of the merits of his present application" (*Id.* at 6a).

The Court of Appeals found that it had been granted a license by this Court's decision in *Sanders* v. *United States,* 373 U.S. 1 (1963), to rehash, if it so wished, the merits of Wilson's identical Sixth Amendment claim. In *Sanders,* the Court was called upon to rule whether a federal prisoner's second motion to overturn his conviction pursuant to 28 U.S.C. § 2255, the equivalent of a habeas corpus vehicle for federal prisoners, was improperly denied without a hearing, where the second petition raised a claim that had not been presented to the District Court on an earlier section 2255 motion. On the way to deciding that *res judicata* did not bar reconsideration of the second petition containing the newly raised claim,* the Court found that "the judicial and statutory principles governing successive applications for federal habeas corpus and motions under section 2255 has reached the point at which the formulation of basic rules to guide the lower federal courts is both feasible and desirable." 373 U.S. at 15. In what must be recognized as dictum, the Court first promulgated its oft-repeated rules by which successive petitions, raising claims identical to those previously rejected after a consideration on the merits, were to be considered. 373 U.S. at 15-17. Then, more directly addressing the situation pre-

* The Court rejected any notion that *res judicata* might bar reconsideration of a successive petition by linking older case law standing for the proposition that principles of *res judicata* did not pertain to habeas corpus, because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged" (373 U.S. at 8), with the Court's observation that the codification of section 2244 "was not intended to change the law as judicially evolved." 373 U.S. at 11. To support the latter conclusion about congressional intent, the Court pointed to the "Reviser's Note," and the pertinent fact that "language in the original bill which would have injected *res judicata* into federal habeas corpus was deliberately eliminated from the act as finally passed. *See* S. Rep. No. 1559, 80th Cong., 2d Sess. 9; Moore, Commentary on the United States Judicial Code (1949), 436-438." 373 U.S. at 11.

sented by Sanders himself, the Court announced rules governing the manner by which successive petitions raising new claims, which implicated the common law concept of "abuse of the writ," were to be determined.* 373 U.S. at 17-18.

Interpreting and applying 28 U.S.C. § 2244, which, as it then existed, was expressly addressed to both state and federal prisoners,** the Court declared that when a federal

* Conceptually, it would seem that the bringing of successive petitions raising an issue identical to one previously determined on the merits is the greater "abuse of the writ." However, in the argot of habeas corpus jurisprudence, the term "abuse of the writ" has been limited to discussions of those situations in which the successive petition raises an entirely new ground for relief which had been completely withheld from an earlier petition (*see, e.g., Rose* v. *Lundy,* 455 U.S. 509, 520-521 [1982]; *Price* v. *Johnston,* 334 U.S. 266, 292-293 [1948]; *Potts* v. *Zant,* 638 F.2d 727, 740-741 [5th Cir. 1981]), or situations where the earlier petition did originally contain the same claim, but there had been an abandonment of the claim before it was considered on the merits. *See, e.g., Wong Doo* v. *United States,* 265 U.S. 239, 241 (1924).

In the case now before the Court, Wilson presented no new claims in his second petition and, therefore, "abuse of the writ" principles are largely irrelevant. Furthermore, we do not argue that the rule of issue preclusion now proposed for "identical successive claim" situations be extended to "abuse of the writ" cases. *See,* p. 20, n., *infra; cf. Woodard* v. *Hutchins,* 464 U.S. 377, 104 S.Ct. 752, 753 (Burger, C.J., and Powell, Blackmun, Rehnquist and O'Connor, JJ., concurring), and 104 S.Ct. at 755 (White, Stevens, JJ., concurring).

** 28 U.S.C. 2244, c. 646, 62 Stat. 965, June 25, 1948, which consisted of but a single paragraph, provided as follows:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person *pursuant to a judgment of a court of the United States, or of any State,* if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents *no new ground* not theretofore *presented and determined, and* the judge or court *is satisfied* that the *ends of justice will not be served by such inquiry*" (emphasis added).

The 1966 amendment of § 2244 struck out the language making this paragraph, now subsection (a), applicable to state prisoners, and instead added subsections (b) and (c), which are applicable to state prisoners exclusively. Pub. L. 89-711, § 1, 80 Stat. 1104 (1966).

court is confronted with a successive habeas petition raising a claim identical to one previously rejected on the merits, "controlling weight may be given to denial of . . . [the] prior application . . . *only if* (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, *and* (3) the *ends of justice would not be served by reaching the merits of a subsequent application.*" 373 U.S. at 15 (emphasis added). After providing a few, non-exhaustive examples of situations in which the "ends of justice" would require the consideration of a successive, identical petition,* the Court placed the burden of proving that the "ends of justice" warranted reconsideration of a previously rejected identical claim on the prisoner. 373 U.S. at 17. The Court also observed that it was, in the end, always for the "federal trial judges" to decide whether they should exercise their discretion in favor of considering the merits of a successive writ. 373 U.S. at 18-19.

Basically, then, *Sanders'* three-pronged test for determining the *de novo,* discretionary reviewability of a state prisoner's successive, identical claim was established by the Court in an exercise of statutory interpretation, guided in large part by the Court's perception of congressional intent. Accordingly, it must surely be recognized as being of considerable import that in 1966 Congress rendered the statutory underpinnings of the *Sanders'* "ends of justice" analysis wholly inapplicable to state prisoners raising successive, identical claims. In that year, as noted (*see* p. 17, n., *supra*), Congress amended section 2244 by excluding state prisoners from the scope of former section 2244, which otherwise remained intact and applicable to federal pris-

* "If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair . . . . If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." 373 U.S. at 16-17.

oners, exclusively, as section 2244(a). Pub. L. 89-711, § 1, 80 Stat. 1104 (1966). Instead, state prisoners became encompassed by newly added subsections (b) and (c).*

Section 2244(b), both as enacted and as currently in effect, provides that if, "after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law," a federal court has denied a state prisoner's constitutional habeas claim, a subsequent petition for habeas relief brought by the prisoner "need not be entertained" by the federal courts unless "the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application of the writ, *and* unless the court, justice or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."** (Emphasis added). Nowhere in section 2244(b) is there any mention of the "ends of justice."

The congressional intent attending the amendment of section 2244 is discussed in Senate Report 1797, accompanying H.R. 5958, 89th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News, 3663-3672 (1966). Congress chose to amend section 2244 by enacting subsections (b) and (c) in order to deal with the ever-swelling tide† of federal habeas corpus litigation by state prisoners:

> ". . . . In many instances the burden has been an unnecessary one, since the State prisoners have been

* Subsection (c), which pertains to state habeas petitioners who have already obtained from this Court a merits determination on a constitutional issue, is not directly relevant to the instant case.

** The pertinent text of § 2244(b) is to be found in Pet., pp. 4-5.

† The Senate Report set forth some statistics showing the increase in state habeas litigation over the years; in 1941 there were 141 habeas writs filed in the federal courts by state prisoners, and by fiscal 1965 the annual count was up to 4,845 petitions. U.S. Code Cong. & Ad. News, 3663-64 (1966). Since then, the annual number of habeas petitions filed by state prisoners has almost doubled: 8,349 (fiscal 1984); 8,532 (fiscal 1983); 8,059 (fiscal 1982); 7,790 (fiscal 1981); 7,031 (fiscal 1980). Source: Annual Report of the Director, Administrative Office of the United State Courts (1984), Table 24, p. 143.

filing applications either containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds obviously well known to them when they filed the preceding application. The bill seeks to alleviate the unnecessary burden *by introducing a greater degree of finality of judgments in habeas corpus proceedings.*

* * *

The purpose of these new subsections [(b) and (c)] is to add to section 2244 of title 28, United States Code, *provisions for a qualified application of the doctrine of res judicata.*" 1966 U.S. Code Cong. & Ad. News, at p. 3664. (Emphasis added).

In consonance with the stated intention of Congress to bring a "greater degree of finality" and "a qualified application of the doctrine of res judicata" to habeas corpus litigation involving state prisoners, section 2244(b) erased the "ends of justice" hurdle that once had to be bounded over by a federal judge before a successive, identical petition might be summarily dismissed. Instead, subsection (b) imposes the requirement that only a new claim, not improperly withheld on a previous occasion, be entertained on the merits. Implicit in this new statutory scheme was a rejection of and departure from the *Sanders* approach to dealing with a state prisoner's successive, identical claim. After all, if *Sanders* satisfied congressional concerns, the subsequent amendment of section 2244 would have been unnecessary.* Whereas the *Sanders* analysis was predicated

* The State does not dispute that the *Sanders* approach to petitions containing new claims, rather than claims previously rejected on the merits, was left substantially unchanged by the 1966 amendments. Indeed, that § 2244(b) and the related habeas corpus Rule 9(b) (*see* Pet., p. 5), were designed to incorporate the *Sanders'* abuse of the writ analysis is confirmed by the Advisory Committee Note and the House Judiciary Committee report attending the enactment of Rule 9(b). *See* 28 U.S.C.A. foll. § 2254, Rule 9, Pub. L. 94-426 § 2(7), (8), 90 Stat. 1335 (Sept. 18, 1976), Advisory Committee Note, pp. 1138-39; H. Rep. 94-147, *reprinted in* 1976 U.S. Code

(footnote continued on next page)

on the assumption that Congress had completely eschewed the application of any *res judicata* principles to habeas corpus in 1948, by 1966 the Congressional objectives in this respect had, as expressly stated in Senate Report 1797, changed. Section 2244(b), thus, strongly favors the presumption that, as a matter of course, repetitive claims would be quickly disregarded, except in the most special of circumstances.

Admittedly, however, as illustrated by the instant case, the demise of the *Sanders* "ends of justice" loophole for avoiding finality went largely unnoticed by the federal judiciary. In the more than two decades since *Sanders,* many courts—even this one—seemed to accept without question that the "ends of justice" standard was still extant.* *See,*

Cong. & Ad. News, 2478, 2481-82. *See Rose* v. *Lundy,* 455 U.S. 509, 520-521 (1982).

In contrast, the Advisory Committee Note, in discussing the provisions of Rule 9(b) pertaining to successive, identical claim petitions ("A second or seccessive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . .") first notes the original language of the three-part *Sanders'* test, and then goes on to state that:

> "[t]he requirement [of Rule 9(b)] is that the prior determination of the same ground has been on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since Sanders."

Nowhere in the Advisory Committee note is there a suggestion that *Sanders'* "ends of justice" requirement survived the 1966 statutory amendment.

* Indeed, before the Court of Appeals, although the State argued that principles of finality required the conclusion that Wilson's second petition not be entertained on the merits, it did not dispute, and even assumed, without review of section 2244(b)'s legislative history, that the *Sanders'* "ends of justice" test was still an applicable rule of law. *See* State's brief in Court of Appeals, p. 12, and State's Petition for Rehearing and Suggestion for Rehearing en Banc, p.6. This assumption, however, does not preclude the present argument from being made in support of the State's continued finality arguments. *See generally, Illinois* v. *Gates,* 462 U.S. 213, 76 L.Ed.2d 527, 554 (1983) (White, J. concurring); *Fuller* v. *Oregon,* 417 U.S. 40, 58 (1974); *Stanley* v. *Illinois,* 405 U.S. 645, 658, n. 10 (1972); *Raley* v. *Ohio,* 360 U.S. 423, 437 n.12 (1959); *Dewey* v. *Des Moines,* 173 U.S. 193, 198 (1899).

e.g., Antone v. *Dugger,* 465 U.S. 200, 104 S. Ct. 962, 965 (1984) ("Nor has the applicant shown any basis for disagreeing with the finding of the District Court and the Court of Appeals that the ends of justice would not be served by reconsideration of those claims previously presented on federal habeas"); *Johnson* v. *Wainwright,* 702 F.2d 909, 911 (11th Cir. 1983); *Cancino* v. *Craven,* 467 F.2d 1243 (9th Cir. 1972); *United States ex rel. Townsend* v. *Twomey,* 452 F.2d 350 (7th Cir. 1972); *United States ex rel. Schnitzler* v. *Follette,* 406 F.2d 319, 321 (2d Cir. 1969).

This has given rise to no remarkable controversy, however, because in most instances, after paying homage to the "ends of justice" analysis, the courts have generally applied section 2244(b) as a firm bar to the relitigation of successive, identical claims previously heard on the merits where there has not been an intervening, true change in the law. *But cf. Bass* v. *Wainwright,* 675 F.2d 1204, 1207 (11th Cir. 1982) ("plain error" in earlier merits decision required hearing on second petition to serve "ends of justice"); *accord, Cancino* v. *Craven,* 467 F.2d at 1246. Moreover, even those courts and commentators who have recognized the deletion of the "ends of justice" language by the 1966 amendment of section 2244 express some confusion and doubt as to what impact the new statutory langauge had on the previous approach established by *Sanders. See, e.g., Walker* v. *Lockhart,* 726 F.2d 1238, 1242, n.10 (8th Cir.), *cert. dismissed,* 105 S. Ct. 17 (1984); *St. Pierre* v. *Helgemoe,* 545 F.2d 1306, 1307-08 (1st Cir. 1976); *Developments in the Law: Federal Habeas Corpus,* 83 Harv. L. Rev., 1038, 1151-52 (1970) ("The congressional purpose in excluding reference to the "ends of justice" *was probably* to discourage use of that exception without expressly limiting it in any formal way") (emphasis added); *and cf.* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 4267, pp. 689-690 (1978) (Reading "ends of justice" language into section 2244(b)—"Thus the statute does not interfere in any way with the power of the court to consider the second application when the ends of justice require it").

Now, however, with the extreme results of the instant case, engendered by the Court of Appeals' blind acceptance of the no longer applicable *Sanders'* "ends of justice" language, we urge the Court to do away with all of the confusion and speculation, and breathe life into the manifest congressional purpose of bringing a "greater degree of finality of judgment" and a meaningful, "qualified application of the doctrine of res judicata" to the manner by which the federal judiciary must evaluate successive, identical claims being brought by state prisoners. To do this, the Court should expressly disavow the outmoded and all-too-vague *Sanders'* analysis, and formulate a more practical, better defined set of guidelines, founded on section 2244(b), which will treat even-handedly the rights of all parties to federal habeas litigation, and serve, as well, the compelling societal and judicial interests involved.

2. Unencumbered by the now inapplicable and statutorily unjustified test for dealing with successive, identical claims set forth in the dictum of *Sanders* v. *United States,* 373 U.S. 15-17, the Court should disregard that questionable precedent and forge a new, more definite rule, fair to all the parties in habeas litigation, which would effectuate the express congressional purposes underlying the enactment of section 2244(b), and would better serve the important societal and governmental concerns which attend the unique federal-state relationship created by habeas corpus. We submit that the fairest and most practical rule is one that would apply a qualified, but generally firm, doctrine of issue preclusion, analogous to the concept of collateral estoppel,* to successive habeas petitions filed by state pris-

* *See, generally, Migra* v. *Warren City School Dist. Bd. of Education,* 465 U.S. 75, 104 S.Ct. 892, 894 n.1 (1984); *United States* v. *Mendoza,* 464 U.S. 154, 104 S.Ct. 568, 571 N.3 (1984); *Allen* v. *McCurry,* 449 U.S. 90, 94-98, n.5, 12 (1980).

The State's argument should not be misread as suggesting that this proposed doctrine of issue preclusion would serve as a bar to obtaining federal habeas review following a merits determination by the state courts. *See Allen* v. *McCurry,* 449 U.S. at 98, n.12; *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973); *cf. Stone* v. *Powell,* 428 U.S. 465 (1976).

oners raising claims identical to those previously determined and rejected on the merits in an earlier federal habeas proceeding. The general rule we seek is one providing that after a state prisoner has had one full and fair opportunity to litigate the merits of a constitutional claim before the federal judiciary, a subsequent petition by him raising the identical claim should be subject to a requirement of mandatory, summary dismissal. *Cf. Stone* v. *Powell*, 428 U.S. 465, 494-495 (1976) (where state prisoner has had full and fair opportunity to litigate merits of Fourth Amendment claim in the state courts, he may not be heard at all on habeas corpus).

However, recognizing that the "need not entertain" language of section 2244(b) is suggestive of a residual, discretionary power in the federal courts to reconsider an identical claim, we contend that the general rule should be qualified by exceptions to presumptive finality when warranted by extraordinary situations, such as when the petitioner presents newly discovered and previously unavailable favorable facts which would have an outcome determinative effect on the earlier habeas proceeding,* or when there has been an intervening, significant change in the law which the prisoner can demonstrate would be accorded retroactive, collateral application if he were, instead, bringing his petition for habeas relief on for the first time.**

* This exception, predicated upon a simple notion of basic fairness, is consistent with the long-established rules that even a jury verdict, once rendered, may be reopened and set aside on the grounds of newly discovered evidence. *See, e.g.*, F. R. Crim. P. 33; New York Criminal Procedure Law § 330.30 (3), 440.10(1)(g) (McKinney 1984).

** *Sanders* provided that an "intervening change in the law" would warrant a reconsideration of a previously rejected issue to serve "the ends of justice." 373 U.S. at 17. We believe, however, that it is fair to allow a reconsideration of a legal issue based on a substantial change in the law only when that new rule would be retroactively applicable on collateral habeas attack in the first instance, a likelihood that is by no means assured. *See Solem* v. *Stumes*, 465 U.S. 638, 104 S. Ct. 1338, 1345-46 (1984). It would be absurd to place the state prisoner who files a successive writ in a better situation than a first-time habeas petitioner, who would receive absolutely no benefit from a non-retroactive, new rule of law.

This rule would strike a reasonable and just balance between the reverence that must be paid to the "Great Writ" (*see Stone* v. *Powell*, 428 U.S. at 1475, n.6), and the very real need to bring a certain termination, at some point, to habeas litigation challenging the validity of a state-court conviction. Under this rule, there is no danger that a state prisoner whose liberty is at issue will be denied the chance to have the federal courts give plenary consideration to a properly cognizable constitutional claim.* *See Fay* v. *Noia*, 372 U.S. 391, 424 (1963); *Price* v. *Johnston*, 334 U.S. 266, 291 (1948). At the same time, the manifest irrationality of treating federal habeas as an ever-turning merry-go-round, perpetually holding out to the prisoner the possibility of a lucky snatch of the elusive brass ring, would, justifiably, come to an end.

The pressing need for greater finality in habeas corpus litigation has been recognized not only by Congress, when it stepped away from *Sanders* by enacting section 2244(b), but also by the members of this Court, who, on a number of recent occasions, have pointed out the deleterious effect that lack of finality has on federal-state relations, and on our system of justice. *See, e.g., Engle* v. *Isaac*, 456 U.S. 107, 126-128 (1981); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 263-265 (1973); *Sanders* v. *United States*, 373 U.S. at 24-25 (Harlan, J., dissenting); *see also*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). Congress focused, at the time it enacted section 2244(b), on the heavy burden being placed on limited federal judicial resources. U.S. Code Cong. & Ad. News, 3663-64 (1966). In view of the further, huge increase in federal habeas litigation since those concerns were addressed by Congress, the problem, undoubtedly, must be recognized as one of major proportion today. *See*, p. 19, n.†. But, while the strain on scant judicial resources

* Of course, if the prisoner attempts to manipulate the system of criminal justice by improperly withholding a claim from an earlier petition, he may lose the right of subsequent review of a newly raised claim under traditional "abuse of the writ" principles which are unrelated to the case at hand.

may be substantial, the strain placed on federal-state relations, is worse. As the Court's members have recognized, principles of habeas finality are integrally related to the constant friction that exists between the state and federal judicial systems:

> "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

Engle v. *Isaac,* 456 U.S. at 128.

Another "significant cost" exacted by the writ that also serves to detract from federal-state comity is that "the writ degrades the prominence of the [state] trial itself." *Engle* v. *Isaac,* 456 at 127; *see Wainwright* v. *Sykes,* 433 U.S. 72, 90 (1977). Although the Court has emphasized that the state trial should be viewed as the "main event" (*Wainwright* v. *Sykes,* 443 U.S. at 90; *Barefoot* v. *Estelle,* 463 U.S. 880, 77 L.Ed.2d 1090, 1100 [1983]), repetitive resort to federal habeas, of the type illustrated by the tortuous procedural history of the instant case, frequently reduces the state trial to a seemingly inconsequential preliminary bout heading a full card of knock-down, drag-out legal fights in the federal courts.

Federal-state relations undergo a further, severe strain stemming from the "miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible years after the offense." *Hankerson* v. *North Carolina,* 432 U.S. 233, 247 (1977); *see Engle* v. *Isaac,* 456 U.S. at 127-128. In the present case, Wilson's guilt of murdering Sam Reiner in 1970 was established to a certainty not only by his admissions to Benny Lee, but also by the independent, overwhelming circumstantial evidence of his guilt. But, obviously, there is only a minute likelihood of conviction if the case were to be retried in

1985. Indeed, it is highly doubtful that any of the State's eyewitnesses might ever be located. For the people of New York State, the probable result of such a retrial could only serve to stoke the fires of federal-state conflict.

The discretionary, "controlling weight" doctrine, as articulated in *Sanders* v. *United States,* 373 U.S. at 15, could do little to bring real finality to habeas litigation. It matters not that, even under *Sanders,* the federal courts rarely granted relief on a petition raising a successive identical claim, because it is the potential for a discretionary grant of relief which shines as a beacon for state prisoners who will forum shop with their constitutional claim in the hope that the "right" sympathetic District Judge or Court of Appeals panel will be found. *See, e.g., United States ex rel. Williams* v. *McMann,* 430 F.2d 1284-85 (2d Cir. 1970). Worse, the term "ends of justice" is so vague and difficult to define that, as shown by the instant case, it invites a judge or court to grant habeas relief on a successive, identical claim based merely upon a simple disagreement with the legal analysis used in the previous case.*

In contradistinction to the loosely defined *Sanders'* guidelines, the rule advocated by the State in this case would promote and support these societally important principles of finality, comity, federalism, and basic justice.** The inherent tensions in federal-state relations would be somewhat relaxed, and the "costs" exacted by habeas corpus would be reduced. Most importantly, this could be accomplished fairly, without any true diminution of state prisoners' rights. As previously noted, even under *Sanders* a successive identical claim was most likely not to

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* Even the "plain error" test employed by some of the Circuits adhering to *Sanders'* "ends of justice" approach (*see Bass* v. *Wainwright,* 675 F.2d 1204, 1207 [11th Cir. 1982]; *Cancino* v. *Craven,* 467 F.2d 1243, 1246 [9th Cir. 1972]), offers little objective guidance and allows a court to issue the writ where it merely has some disagreement with the legal ruling reached by the earlier federal court.

** The rule would also have the important side effect of promoting consistency within the federal court system. *See Allen* v. *McCurry,* 449 U.S. at 94.

meet with any success, so for the overwhelming majority of prisoners the newly proposed rule of issue preclusion would deprive them of nothing, in real terms. Presumably, however, the rule would have the salutary effect of dissuading many of them from bringing successive claims that would now be, more obviously, futile.

Furthermore, any concern that this new rule would treat state prisoners less fairly than federal prisoners, whose successive claims are still governed by the "ends of justice" language of section 2244(a) and *Sanders*, is illusory in nature. For it has to be remembered that a section 2255 motion must ordinarily be made before the federal district judge who presided over the trial; this requirement is enforced by Rule 4(a) of the rules governing section 2255 proceedings. 28 U.S.C. foll. § 2255, Rule 4(a). Furthermore, any appeal from that judge's order will proceed to the Circuit Court of Appeals that, in most instances, will have previously affirmed the federal judgment of conviction, rendering highly unlikely the possibility of success. *See Developments in the Law—Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1064, 1066 (1970) ("It is the uniform practice of the lower federal courts to refuse to hear in section 2255 proceedings questions previously considered on appeal .... Even if the decision were reversed by the district court, it is hard to imagine the Court of Appeals also reversing its own prior determination of the identical claim"). Hence, in practice, even under the proposed rule of qualified issue preclusion, the state prisoner whose constitutional claim is heard by the lower and appellate courts of both the state and federal systems would be more likely to find a judge or court receptive to his constitutional contention because the federal prisoner's more liberal access to the courts on a section 2255 motion containing a successive, identical claim is offset by the general requirement that the same trial judge entertain each of those motions.

Finally, the pronouncement of this rule of issue preclusion would not conflict, other than superficially, with the traditional assumption that principles of *res judicata* were

not applicable to habeas corpus. The simple answer is that, as already made clear, Congress amended section 2244 for the express purpose of introducing "qualified principles of *res judicata*" into habeas corpus, in derogation of the common law precedents and § 2244 as originally enacted. *See* p. 17, n., *supra*. Moreover, older judicial statements of this Court excluding *res judicata* analysis from habeas corpus were often directed at situations considering the *res judicata* effect of state judgments (*see, e.g. Preiser* v. *Rodriguez,* 411 U.S. at 497; *Brown* v. *Allen,* 344 U.S. 443, 458 [1953]), or situations where the Court was considering the *res judicata* effect of a denial of an earlier habeas petition on a later petition raising a new, previously unheard, claim. *See, e.g., Price* v. *Johnston,* 334 U.S. at 287-293. Patently, these aspects of habeas *res judicata* analysis are unrelated to and unaffected by the narrower rule of qualified issue preclusion that we urge in this case.

While it is true that in *Salinger* v. *Loisel,* 265 U.S. 224, 230 (1924), the Court announced that *res judicata* did not apply in a case where a federal prisoner was bringing successive, identical habeas claims to prevent extradition, that case is of limited application here because in *Salinger* principles of comity and federalism did not come into play, and the habeas petitions were not being used to relitigate an entire state-court trial. In any event, nothing in *Salinger* prohibits a qualified rule of issue preclusion if Congress authorized it by statutory enactment.

In the end, therefore, the rule of issue preclusion which we propose should be accepted as a reasonable middle-ground, serving to effectuate the intent of Congress to bring a greater degree of finality to habeas litigation, while preserving a state prisoner's full and fair opportunity to have his constitutional claims entertained in plenary fashion, on the merits, by the federal judiciary.

3. Applying this qualified rule of issue preclusion to the circumstances of the present case, it is evident that the most recent Court of Appeals panel exceeded its proper authority when it entertained the merits of Wilson's second

habeas petition, and then granted him complete relief. Unquestionably, the Sixth Amendment *Massiah* claim relating to the incriminating admissions he made to Benny Lee was identical to the claim raised and rejected on the merits on the first petition, despite the new, additional arguments concerning this Court's intervening decision in *United States* v. *Henry,* 447 U.S. 264. *See Sanders* v. *United States,* 373 U.S. at 16. And, nowhere in the second petition did Wilson allege any new, favorable material facts which might have raised a doubt about the accuracy of the original factual and legal determinations.

Wilson did, however, argue that the intervening *Henry* decision created a new rule of law, which should be applied retroactively.* But, this contention was completely rejected by the Court of Appeals (Pet. App. A, pp. 12a-14a). Hence, by the Court of Appeals' own analysis, any justification for a reconsideration of the constitutional claim would be eliminated under the new, qualified rule of issue preclusion.

Moreover, the Court of Appeals' holding that *Henry* did not create new law, but "merely applied the 'deliberately elicited' test of *Massiah* to new facts," was correct, as the majority of this Court, in *Henry,* made clear when it stated that the issue presented there was "whether under the facts of this case, a government agent 'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah.*" 447 U.S. at 270. A review of Wilson's opposition to the State's petition for certiorari (pp. 18-19), suggests that he, too, now recognizes that *Henry* did not create a new rule of constitutional law.

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* In the memorandum of law in support of the second petition, Wilson's counsel argued:

> "The only issue before the Court is whether Wilson should have the benefit of the Supreme Court's decision in *Henry.* That decision established a right to counsel under a new set of circumstances that are present here. Furthermore, all relevant considerations militate for the retroactive application of the new rule to Wilson.
>
> First, *Henry* changed the law . . . ." (JA. 145)

Yet even if *Henry* did create a new rule of law during the intervening period between Wilson's first and second habeas petitions, the outcome of the present analysis would be no different. For in light of this Court's decision in *Solem* v. *Stumes,* 465 U.S. 638, 104 S.Ct. 1338, 1342-45 (1984), where the Court refused to apply the new Sixth Amendment rule of *Edwards* v. *Arizona,* 451 U.S. 477 (1981), retroactively in a collateral, habeas attack on Stumes' conviction, it seems rather certain that Wilson would not be able to demonstrate that *Henry* would be applied retroactively even if it did create a new Sixth Amendment rule. Accordingly, since it would be manifestly unfair to accord Wilson a broader right of judicial consideration than the first-time habeas petitioner, his successive, identical claim should be subject to mandatory, summary dismissal.

B. At the very least, issue preclusive effect must be accorded to the factual determinations previously made by the federal courts.

Wilson's statements to Benny Lee were found by the state trial court, as a matter of fact, to be "spontaneous" and "unsolicited" (JA. 63). The federal courts that considered the case prior to the recent Court of Appeals panel properly accepted the correctness of those factual determinations (*see* 28 U.S.C. 2254(d)]; *Sockwell* v. *Blackburn,* 748 F.2d 979, 981 [5th Cir. 1984], *cert. denied,* —— U.S. ——, 105 S. Ct. 2049 [1985]) and reconfirmed that the statements were "spontaneous" (Pet. App. C, 28a; Pet. App. D, 32a) and "completely unsolicited" (Pet. App. E, 41a). Based on those factual determinations of spontaneity, a violation of *Massiah,* even as applied by *Henry,* could never be found. *See United States* v. *Henry,* 447 U.S. at 276 (Powell, J., concurring), cited with approval in *Snead* v. *Stringer,* 454 U.S. 988, 993 (1981) (Burger, C.J., Rehnquist, and O'Connor, JJ., dissenting from denial of certiorari).

Because Wilson had had a full and fair opportunity to litigate that factual issue of spontaneity in the state and

federal courts, the recent Court of Appeals' panel should have been summarily precluded from reconsidering those settled factual matters and reaching the contrary, faulty conclusion (*see* Point II, pp. 39-42) that the statements were other than spontaneous. Even if this Court were not to accept the argument proffered above that it should promulgate a qualified, but generally firm, rule of issue preclusion applicable to the reconsideration of successive, identical legal claims, at the very least it should insist that even in habeas corpus litigation, purely factual determinations mad. in an earlier habeas action between the parties, particularly when those determinations have been made or adhered to by a court of coordinate jurisdiction, must be accorded the issue preclusive effect warranted by ordinary principles of collateral estoppel. It may be that when a man's liberty is at stake, a successive reconsideration of legal decisions, previously made on the merits, must be tolerated, but there is no common sense in allowing perfectly good factual determinations made by earlier federal courts to fall by the wayside merely because a new Court has taken jurisdiction of the case. The law can change, but once-found historic facts never do. The most recent panel of the Court of Appeals was wholly unjustified in substituting its own factual determinations for those of the earlier federal courts, as it had no monopoly on the ability to find the "truth."

The Court, therefore, should take this opportunity to undo the potential for such an irrational result by generally requiring the lower federal courts to defer not only to the factual findings of state courts (28 U.S.C. § 2254[d]), but also to the factual determinations of other courts within the federal system, once the habeas litigant has had one full and fair opportunity to debate those facts in an earlier federal proceeding.

C. Even under an "ends of justice" analysis, a federal court should be without discretion to entertain a successive, identical claim by a state prisoner which has been previously considered on the merits and rejected by the federal judiciary, absent the presentation of material new facts or an intervening change in the law which is to be applied retroactively on collateral review.

Were this Court to rule that a discretionary "ends of justice" exception to presumptive finality must be factored into habeas litigation involving the consideration of successive identical claims under section 2244(b), because of the less-than-mandatory "need not entertain" language of that section, the Court should nevertheless declare that a proper interpretation of that amorphous term demands the conclusion that a federal court would be without such discretion to reconsider when there has been a full, previous merits review of the issue, and no new, material facts or new, retroactive rule of law has been presented by the subsequent petition. For, any current application of the term "ends of justice" must be undertaken with an eye toward, and in the context of, the express purpose of bringing a "greater degree of finality" and a "qualified application of the doctrine of res judicata" to habeas litigation which Congress sought to achieve when it enacted section 2244(b). To serve that congressional intent, "ends of justice" would have to be a more understandable and objective standard than that which was loosely articulated by the Court in *Sanders* v. *United States*, 373 U.S. at 16-17, 18-19.

The *Sanders* approach to discretionary, "ends of justice" reconsideration, as the present case demonstrates, does violence to any meaningful notion of habeas finality. Under *Sanders*, federal courts are left, ultimately, to their own devices for deciding whether to entertain a successive, identical claim, and nothing more than simple disagreement with a previously announced decision may be used as a license to conduct a plenary review of the repeated claim. The serious, negative impact that this could have on federal-

state relations has already been recognized by some of the federal Courts of Appeal, which have, on previous occasions, applied a finality rule of the type the State advocates here.*

We believe that the "ends of justice" do not allow for the concept that the finality of fifteen years of state and federal litigation may, in the end, be reduced to a dependency upon an uncircumscribed exercise of judicial discretion, perhaps guided by nothing more than an arbitrary disagreement that one federal court may have with the constitutional analysis of another court of coordinate jurisdiction. Inapporpriate exercises of judicial discretion of the type which occurred in the instant case may be prevented by a reasonable rule, of the sort we urge, which requires that something more substantial than simple disagreement serve as the basis for undoing the finality of a merits determination made by another federal court.

Moreover, any rule requiring that objective criteria serve as the guidelines for determining whether there should be a reconsideration of a successive identical claim will be meaningful only if courts are not permitted to rely on "boilerplate" language to satisfy that rule. Rather, there should be an insistence that before a court may invoke the "ends of justice" to allow it to entertain a previously heard claim, it must articulate the objective grounds that warrant resort to the exercise of an extraordinary, discretionary right of reconsideration. Not only would this aid the lower courts in assuring that they would be exercising this discretion soundly, but it would also provide necessary

* Ironically, that approach was first employed by a panel of the Court of Appeals for the Second Circuit, in *United States ex rel. Schnitzler* v. *Follette,* 406 F.2d 319 (2d Cir. 1969), which overturned a district court's discretionary decision, based on the "ends of justice," to reconsider an issue previously entertained on the merits by an earlier district court and panel of the Court of Appeals. It was held that the district court had no discretion to reconsider the identical claim. 406 F.2d at 332; *accord: United States ex rel. Townsend* v. *Twomey,* 452 F.2d 350, 353-355 (7th Cir. 1971), *cert. denied,* 409 U.S. 854 (1972); *and see Walker* v. *Lockhart,* 726 F.2d 1238, 1248 (8th Cir.), *cert. dismissed,* —— U.S. ——, 105 S.Ct. 17 (1984).

insight to an appellate court which might later review that exercise of discretion. *Cf. Sumner* v. *Mata,* 449 U.S. 539, 551-552 (1981)

POINT TWO

In view of the presumptively correct state court finding that Wilson's inculpatory jailhouse statement to an undisclosed government agent was spontaneous and unsolicited, the statement was not "deliberately elicited" in violation of the Sixth Amendment right to counsel.

Prior to Wilson's trial, a state court conducted a hearing to determine the admissibility of statements made by Wilson to his cellmate, Benny Lee. The hearing court credited the uncontradicted testimony of the state's witnesses and found the following facts: (1) that Lee was instructed to ask no questions, but only to listen to what Wilson said in his presence; (2) that Lee followed those instructions; and (3) that the statements Wilson made to Lee were spontaneous, unsolicited, and voluntary (JA. 62-63). The recent two-judge majority of the Court of Appeals, however, unlike the two district judges and the prior Second Circuit panel majority that had previously considered Wilson's case, completely disregarded those findings, as well as significant portions of the record that supports them. Instead, it relied on its own factual findings, which, in addition to being "considerably at odds" with the state court's findings [*see Sumner* v. *Mata,* 449 U.S. 539, 543 (1981)], are, in critical respects, without foundation in the record. If proper deference is given to the state court's findings and to the record underlying them, however, the statements made by Wilson in Lee's presence can not be deemed "deliberately elicited" within the meaning of *United States* v. *Henry,* 447 U.S. 264 (1980), and *Massiah* v. *United States,* 377 U.S. 201 (1964). Thus, assuming that the court below could properly reconsider the claim raised on Wilson's successive habeas corpus petition [*see* Point One, *supra*] and that *Henry* should be applied retroactively

in a habeas corpus proceeding,* this Court should conclude that the Court of Appeals erred in its determination that Wilson's constitutional right to counsel was violated by the use at trial of his inculpatory statements.

A. The state court's findings are entitled to deference pursuant to 28 U.S.C. § 2254(d).

The power of a federal habeas corpus court to determine factual issues is expressly limited by 28 U.S.C. § 2254(d), which provides that, where there has been a state court finding of fact following a hearing, that finding must be presumed to be correct unless one of eight enumerated exceptions applies. As this Court has recognized, that statute serves both to minimize the inevitable friction between the federal and state courts that is generated by habeas corpus proceedings [*Sumner* v. *Mata*, 449 U.S. at 550 (1981)] and to insure "that there will at some point be the certainly that comes with an end to litigation . . ." *Id.*, n.3, quoting *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). To lend weight to the congressional mandate and to its salutary purposes, this

* The Court of Appeals obviated the question of *Henry's* retroactivity by agreeing with the State's position that *Henry* did not create a new rule, but merely applied settled precedent to a different factual situation (Pet. App. A, pp. 11a-14a). Although Wilson's petition for a writ of habeas corpus was expressly premised on the theory that *Henry* changed the law, he has apparently abandoned that theory. *See* Brief in opposition to petition for a writ of certiorari, pp. 18-19). If Wilson's original contention were valid, however, the "new" rule of *Henry* would fail to satisfy the criteria by which this Court determines whether retroactive effect is appropriate: The Sixth Amendment issue with which *Henry* was concerned does not bear upon the reliability of trial evidence or the truthfinding function of a trial; the "prior" rule of law was relied on extensively, not only by law enforcement authorities, but by the state and federal courts; and investigation into claims of similar violations would severely disrupt the administration of justice by reopening countless final judgments. *See Solem* v. *Stumes*, 465 U.S. 638 (1984) (New Sixth Amendment rule forbidding further interrogation after invocation of right to counsel does not meet any of the three criteria for retroactivity and is therefore not applicable in habeas corpus proceeding). Therefore, if the holding of *Henry* could be deemed a "new" rule, it clearly should not be applied retroactively on collateral review of a final conviction.

Court has held that a federal court may not dispense with the presumption of correctness without explaining the reasoning that led it to conclude that one of the enumerated exceptions is applicable. *Id.* at 551. Moreover, this Court has held that the "high measure of deference" to which state court findings are entitled requires that they be treated as dispositive unless they lack even "fair support" in the record and there is "convincing evidence" to the contrary. *Wainwright* v. *Witt*, —— U.S. ——, ——, 105 S. Ct. 844, 856 (1985); *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) *Marshall* v. *Lonberger*, 459 U.S. 422, 432 (1983).

The "issues of fact" to which the presumption applies are "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . . .'" *Townsend* v. *Sain*, 372 U.S. 293, 309, n.6 (1963), quoting *Brown* v. *Allen*, 344 U.S. 443, 506 (1953); *see Cuyler* v. *Sullivan*, 446 U.S. 335, 341-42 (1980) (applying the quoted language to the subsequently enacted habeas corpus statute). Although the constitutional issue raised by a habeas petitioner may entail a mixed question of law and fact, "the questions of fact that underlie this ultimate conclusion *are* governed by the statutory presumption . . . ." *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (emphasis in original). Thus, a federal court, in assessing a constitutional claim according to appropriate legal standards, must respect the state court's findings of historical facts ". . . and the inferences fairly deducible from these facts." *Marshall* v. *Lonberger*, 459 U.S. at 435.

Clearly, in the present case, the determination of the state court that Wilson's statements were unsolicited and spontaneous is a finding of historical fact to which the federal courts were bound to defer.* *See Sockwell* v. *Black-*

* In an attempt to classify the finding of spontaneity as a legal conclusion, Wilson has argued that the state court found only one fact—that Lee did not interrogate Wilson—and that, "[o]n the basis of this finding, it concluded that Wilson's statements were 'spontaneous' and 'voluntary'" (Brief in opposition to petition for a writ of certiorari,

(footnote continued on next page)

burn, 748 F.2d 979, 981 (5th Cir. 1984),*cert. denied,* —— U.S. ——, 105 S. Ct. 2049 (1985) (state court's finding that statement was spontaneous accorded statutory presumption of correctness). *See also People* v. *Harrell,* 59 N.Y.2d 620, 463 N.Y.S.2d 185, 449 N.E.2d 1263 (1983); *People* v. *Ellis,* 58 N.Y.2d 748, 459 N.Y.S.2d 32, 445 N.E.2d 208 (1982) (lower courts' finding that statements were spontaneous treated as factual conclusions, reviewable by New York Court of Appeals only if unsupported by record). The determination that Wilson's utterances were spontaneous and unsolicited did not entail application of a legal standard, but rested solely on the hearing court's assessment of the credibility of the state's witnesses at the hearing and the import of their testimony. *Cf. Marshall* v. *Lonberger,* 459 U.S. at 436-37 (federal court must apply legal standard to facts to determine if plea was "voluntary" in the constitutional sense); *but see Maggio* v. *Fulford,* 462 U.S. 111, *reh. denied,* 463 U.S. 1236 (1983) (competence to stand trial is a factual issue regarding which federal court must defer to state court's findings). As District Judge Gagliardi recognized, the state court's finding that Wilson's statements were "spontaneous" was fully supported by the hearing record, which "established that petitioner's initial false exculpatory statements to Lee were a spontaneous response to petitioner's view of the Star Taxicab Garage from his cell window, and that petitioner's ultimate confession to Lee was a spontaneous response to a disturbing visit petitioner received from his brother" (Pet. App. C, p. 28). By completely disregarding those facts, the Court of Appeals circumvented the statutory mandate, which requires "the federal courts to face

p. 21). The hearing court's decision, however, makes it clear that it did not deem Wilson's statement spontaneous *because* there was no interrogation, as Wilson's argument suggests, but, rather, that it found "the fact that the defendant's utterances in Lee's presence were spontaneous *and* not as a result of any interrogation by Lee" (JA. 63) (emphasis added).

up to any disagreement as to the facts and to defer to the state court unless one of the factors listed in § 2254(d) is found." *Sumner* v. *Mata,* 455 U.S. 597-98.*

B. The Court of Appeals disregarded conflicting state court findings and relied upon "facts" not supported by the record.

The Court of Appeals supported its conclusion that Wilson's statements were "the product of" his conversations with Lee by offering the following rendition of the facts:

> Here, after Lee was summoned by Detective Cullen, he was shown a picture of Wilson. Lee asked whether he could do anything to help with the case. After agreeing to cooperate, Lee was told that Wilson was soon going to be arrested and placed in Lee's cell. He was directed to find out as much information from Wilson as he could without asking questions. The fact that the government moved Wilson into a cell overlooking the Star Taxicab Garage—the scene of the crime—achieved the desired effect. As soon as Wilson arrived and viewed the garage, he became upset and stated that "someone's messing with me." The catalytic effect of being placed into this "room with a view" thus gave rise to expressed uneasiness on Wilson's part. Even accepting that Lee did not ask Wilson any direct questions, he effectively deflated Wilson's exculpatory version of his connection to the robbery scene by remarking that the story did not "sound too good" and that he had better come up with a better one. Subtly and slowly, but surely, Lee's ongoing verbal intercourse with Wilson served to exacerbate Wilson's already troubled state of mind. Lee testified that after several days and nights together,

* Although, in some instances, it might be appropriate for this Court to remand a case to permit the Court of Appeals to explain why it deemed one of the enumerated exceptions applicable, no useful purpose would be served by such a procedure in this case, because the record clearly supports the state court's findings (*See* Point Two, section B, *infra*), and none of the other exceptions are pertinent to the circumstances of this case.

> Wilson's version of the events surrounding the robbery changed "in bits and pieces." During this same time, Lee furtively made notes of his conversations with Wilson, which he later handed over to the police. (Pet. App. A, pp. 9a-10a).

As closer analysis will reveal, the Court of Appeals could only have arrived at this version of the facts by disregarding the state court's findings, as well as key parts of the record underlying them, and by relying on "facts" that are not supported by the record.

"[*Lee*] *was directed to find out as much information from Wilson as he could without asking questions.*" There is no support in the record for the finding that Lee was asked to find out "as much information from Wilson as he could." On the contrary, both Lee and Detective Cullen testified that Lee was asked to listen to Wilson only for the purpose of learning the names of his two unapprehended accomplices (JA. 24, 37).

"*The fact that the government moved Wilson into a cell overlooking the Star Taxicab Garage—the scene of the crime—achieved the desired effect.*" No evidence in the record even remotely supports the inference that the effect the view of the Star Garage would have on Wilson was anticipated, much less "desired," by the police; certainly, the state court made no such finding. The record does, however, indicate that Lee had been moved to the cell with a view of the garage approximately two weeks prior to Wilson's arrival (JA. 37), which means that he was there long before the robbery and murder occurred. While it is, of course, possible that Lee was chosen specifically because of the location of his cell, speculation that Detective Cullen was motivated by that circumstance would require attributing to him a far more sophisticated degree of psychological cunning than anything in the record serves to suggest. *See Rhode Island* v. *Innis,* 446 U.S. 291, 302 (1980) (there was nothing in the record to suggest that the police were aware that the defendant was particularly susceptible to an appeal to his conscience); *cf. Brewer* v. *Williams,* 430

U.S. 387 (1977) (detective's delivery of "Christian burial speech" was, by his own concession, a psychological ploy calculated to induce an incriminating statement from the defendant). It is far more plausible that the location of Lee's cell, like the fact that the crime was committed in close proximity to the Bronx House of Detention, was purely coincidental. Moreover, the only "effect" the move to the cell overlooking the garage achieved was to prompt an exculpatory statement, which was substantially the same as the one Wilson had already made to Detective Cullen.

"[*Lee*] *effectively deflated Wilson's exculpatory version of his connection to the robbery scene.*" The Court of Appeals failed to note that, notwithstanding Lee's remark that the story did not "sound too good," Wilson "stuck to the story" (JA. 39). Thus, it can hardly be said that Lee's comment "effectively" deflated Wilson's original account of his actions at the time of the crime.*

"*Subtly and slowly, but surely, Lee's ongoing verbal intercourse with Wilson served to exacerbate Wilson's already troubled state of mind.*" Whereas the record lacks any evidence that Lee employed a "subtle" verbal technique to wear away at Wilson's resolve to deny his guilt, or that his verbal intercourse with Wilson was "ongoing", it contains an uncontradicted depiction of the specific incident that exacerbated Wilson's mental state: a visit

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* Lee's remark that Wilson "had better come up with a better" story appears only in his trial testimony (JA. 81). Thus, in referring to that remark, the Second Circuit was relying on evidence which was not considered by the hearing court in connection with its decision on Wilson's suppression motion and, consequently, under New York law, could not be considered by appellate courts with regard to the suppression issue. *People* v. *Gonzalez,* 55 N.Y.2d 720, 447 N.Y.S.2d 145, 431 N.E.2d 630 (1981), *cert. denied,* 456 U.S. 1010 (1982) It should be noted that Wilson never moved to reargue the suppression motion based on evidence subsequently adduced at trial. Thus, the facts that emerged at trial were never "fairly presented" to the state courts with regard to the claim that Wilson's statements were unconstitutionally obtained and, therefore, under the doctrine of exhaustion of state remedies, should not have been considered by a federal court in connection with that issue. *Picard* v. *Connor,* 404 U.S. 270, 275 (1971); 28 U.S.C. § 2254(b) and (c).

from his brother in which he learned that his family held him at fault for the murder of Sam Reiner (JA. 41-42). Remarkably, the Court of Appeals ignored this crucial incident, notwithstanding the significance attached to it by the District Court, and determined, with no apparent basis, that it was Lee's conversations with Wilson that caused him to become upset and eventually to admit his guilt. In doing so, the Court of Appeals also blinked at the state court's determination that Wilson's utterances were spontaneous.

Thus, it was the Court of Appeals that subtly and slowly, but surely, caused the details of the case before it to change in bits and pieces. Whereas the hearing record, and the state court findings arising from it, reflect that Detective Cullen enlisted the aid of Benny Lee for the purpose of learning, without active efforts, the identities of two unapprehended murderers and that Lee heard an incriminating statement prompted by Wilson's spontaneous response to his own family's rebuke, the Court of Appeals based its opinion on a scenario in which a detective slyly plotted to jar a confession from a defendant's mouth through a calculated stratagem by which he exposed the defendant to the scene of his crime—knowing this would strike a resonant chord in his psyche—and then subjected him to a relentless verbal assault by an informant who was directed to extract as much information as possible by any technique that did not involve asking questions. Clearly, the version of the "facts" relied upon by the Court of Appeals can not be reconciled with either the record or the state court's findings; it thus represents a flight of fancy far beyond the limits imposed by 28 U.S.C. § 2254(d). When the facts of this case are returned to the solid ground of the record and are held within the boundaries imposed by the presumptively correct state court findings, it will be seen that they do not justify the Court of Appeals' conclusion that Wilson's case is indistinguishable from *Henry*.

C. The facts of the present case are distinguishable from those of *United States* v. *Henry* and do not establish that the state "deliberately elicited" the incriminating statements used against Wilson at trial.

In *Massiah* v. *United States*, 377 U.S. 201, 206 (1964), this Court held that "the petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at trial evidence of his own incriminating words, which federal agents deliberately elicited from him after he had been indicted and in the absence of counsel." The question before this Court in *United States* v. *Henry*, 447 U.S. 264, 270 (1980), which concerned a defendant's statements to a fellow inmate who was working as an undisclosed government informant, was "whether under the facts of this case, a Government agent 'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah*." In its analysis, the Court pointed to three significant factors:

> First, Nichols [the fellow inmate] was acting under instructions as a paid informant for the government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

Id. at 270. The Court found, in the absence of evidence regarding the specific nature of the conversation from which the incriminating statements emerged, that this combination of circumstances supported the inference that "Nichols deliberately used his position to secure incriminating information from Henry . . . ." *Id.* at 270-71.

In *Henry*, it was necessary to resort to such inferential reasoning because the record, consisting almost exclusively of an affidavit by the detective who had instructed Nichols [*Id.* at 268], did not disclose the specific circumstances that provoked Henry's incriminating remarks. Justice Powell "view[ed] this as a close and difficult case because no evidentiary hearing has been held on the *Massiah* claim." [*Id.* at 277 (Powell, J., concurring)] and Justice Blackmun

observed that, because of the "scant record," "we know only that Nichols and Henry had conversations . . . . We know nothing about the nature of these conversations . . . ." *Id.* at 287-88 (Blackmun, J., dissenting). The limitations posed by the record were similarly recognized in the lower court, where Circuit Judge Butzner noted that "[i]t would have been prudent for the district court to have conducted an evidentiary hearing to dispel the ambiguity of the documentary evidence, particularly since the government did not reveal the substance of its paid informant's conversation" and concluded that "*absent testimony by the informant about what he said to the defendant,* the judgment must be reversed . . . ." *Henry* v. *United States,* 590 F.2d 544, 548 (4th Cir. 1978) (Butzner, C.J., concurring) (emphasis added).

The present record does not suffer from any such limitation. Here, the evidence adduced at the pre-trial evidentiary hearing clearly established that Wilson's impulse to talk about the crime was not stimulated by his cellmate, but, rather, that:

> . . . he [Wilson] was upset over the fact that his brother had come and said that his family was saying that he had killed Sam and why did he kill Sam and this upset him very much and that would start him talking about different things, about the crime and different things [JA. 42].

Thus, in contrast to *Henry,* the facts of this case do not warrant the conclusion that the informant used his position to elicit statements; rather, the evidence makes it clear that Lee merely listened passively while Wilson, prompted by his brother's disturbing remarks, and perhaps by a guilt-ridden conscience, described his role in the murder of Sam Reiner.

That distinction is crucial, for the holding in *Henry* plainly turned on the determination that Henry's incriminating statements were the "product" of his conversations with Nichols. *Id.* at 271. The Court emphasized that "the incriminating conversations between Henry and

Nichols were facilitated by Nichols' conduct . . . ." *Id.* at 274. As Justice Blackmun noted, "[a]ll members of this Court agree that Henry's statements were properly admitted if Nichols did not 'prompt' him." *Id.* at 287 (Blackmun, J., dissenting). Moreover, Justice Powell recognized that "*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action." *Id.* at 276 (Powell, J., concurring). Here, any effect that Lee's conversation may have had on Wilson was attenuated from the incriminating statements, which were the products of an intervening and independent stimulus.

An additional factual distinction between this case and *Henry* lies in the nature of Lee's relationship to the state. In *Henry,* the fact that "Nichols was acting under instructions as a *paid* informant for the Government", [*Id.* at 270 (emphasis added)], was foremost among the factors that the Court deemed important. The Court found it especially significant that, under the terms of his arrangement with the government, Nichols was to be paid only if he produced useful information. *Id.* Lee, on the other hand, had entered into no deal with the state and had received no promise of compensation or leniency for his services (JA. 43, 45-46). Thus, one of the most compelling factors underlying the decision in *Henry* is absent in the present case.

In *Henry,* the informant was given mixed messages: while he was told not to ask questions, he was also made aware that he would be paid only if he discovered useful information. Thus, the contingent-fee arrangement effectively undermined and countermanded the instruction not to inquire and led this Court to conclude that "[e]ven if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." *Id.* at 271. That conclusion, in turn, supported the Court's determination that the government had "intentionally creat[ed] a situation that was likely to induce Henry to make incriminating statements without the assistance of counsel . . . ." *Id.* at 274.

No such conclusion is warranted in the absence of a contingent-fee arrangement. Even granting that—notwithstanding that he had received no promises—Lee may have hoped that his cooperation would inure to his benefit, such a hope surely would not motivate him to defy the express instructions of Detective Cullen. Unlike *Henry,* in the present case, there was no understanding between the informant and the detective that would conflict with the direction to refrain from affirmative conduct to obtain information. See *Thomas* v. *Cox,* 708 F.2d 132 (4th Cir. 1983), *cert. denied,* 464 U.S. 918 (1983) (distinguishes from *Henry* case in which informant, who was directed to listen to incarcerated defendant without asking questions, was not being paid for providing information).

Thus, close examination of the record in the present case reveals that, despite superficial similarities, it involves a substantially different set of circumstances from those that this Court addressed in *Henry.* Because the state did not, as in *Henry,* arrange to pay the informant on a contingent basis, it did not create a situation in which the informant, despite instructions to the contrary, would be likely to take affirmative measures to secure incriminating information from the accused. Moreover, unlike *Henry,* here it could not be said that it was the informant's conduct that induced the defendant to incriminate himself, for it was definitively established—and the state court's findings reflect—that Wilson acknowledged his guilt as a spontaneous reaction to a non-governmental stimulus—his brother's visit. In view of these distinctions, it is clear that the Court of Appeals erred in concluding that the introduction of Wilson's statements at his trial was unconstitutional under *Henry.*

D. Use at trial of statements that were not induced by conduct attributable to the state comports with the Sixth Amendment guarantee of the right to counsel.

Because Wilson's statements arose from impulses unconnected to any conduct on the part of the state or its agents, the Court may now address the situation that

the *Henry* majority expressly refrained from reaching: "the situation where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged." *Henry,* 447 U.S. at 271, n.9. As Justice Powell emphasized in his concurring opinion, "*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action." *Id.* at 276; *see also id.* at 280 (Blackmun, J., dissenting) ("The unifying theme of *Massiah* cases, then, is the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with the specific intent of extracting information in the absence of counsel"). Consideration of the purposes underlying the Sixth Amendment and the historical underpinnings of *Massiah* and *Henry* should compel this Court to recognize that the right to counsel does not extend to a situation in which an informant complies with a detective's request to listen passively to a cellmate's unsolicited utterances.

When this Court announced, in *Powell* v. *Alabama,* 287 U.S. 45, 57 (1932), that criminal defendants are entitled to the assistance of counsel during the "critical period" from arraignment to trial, its primary focus was the need for "consultation, thoroughgoing investigation and preparation" for trial. Its holding reflected a recognition that, without such pre-trial preparation, the right to legal assistance at trial would be a hollow guarantee. Discussing the historical antecedents of the *Powell* decision, the Court in *United States* v. *Ash,* 413 U.S. 300 (1973), recognized two principal concerns from which the constitutional guarantee of counsel derived: the layman's need for "counsel as a guide through complex legal technicalities," *id.* at 307, and "a desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Id.* at 309. The Court observed that the expansion of the right to counsel, in *Massiah* and other cases, to certain extra-judicial situations has been tied to those historical concerns and has turned on whether those situations entail "trial-like confrontations." *Id.* at 312. The test applied by the Court "has

called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.* at 313. Under that test, the right to counsel has been required at "critical confrontations" such as lineups, *United States* v. *Wade*, 388 U.S. 218 (1967), but not during the taking of handwriting samples, *Gilbert* v. *California*, 388 U.S. 263 (1967), blood tests, *Schmerber* v. *California*, 384 U.S. 757 (1966), or photographic identification procedures. *United States* v. *Ash*, 413 U.S. 300 (1973).

That test was clearly applied by the four concurring Justices in *Spano* v. *New York*, 360 U.S. 315 (1959), whose opinions were expressly relied upon in *Massiah*, 377 U.S. at 204-05. In *Spano*, the secret pre-trial interrogation of the defendant by the police was likened to a "kangaroo court procedure whereby the police produce the vital evidence in the form of a confession" and in which a "secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights." 360 U.S. at 325, 326. The recognition that the Sixth Amendment guarantee extends to such a situation clearly hinged on the existence of an adversarial confrontation between the state and the defendant.

In *Massiah*, the Court expanded upon the *Spano* rule by holding that governmental efforts to induce a confession from an indicted defendant are equally unconstitutional when the Government's method is surreptitious and indirect. 377 U.S. at 206. The *Massiah* Court did not, however, negate the importance of a confrontation between the government and the accused as a prerequisite to invocation of the Sixth Amendment right to counsel. Rather, it emphasized the continued necessity of such a confrontation by pointedly using the phrase "deliberately elicited." *See* Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does it Matter?*, 67 Geo. L.J. 1, 42 (1978) ("The use of the term 'deliberately elicited' seems to be quite intentional"). In *Massiah*, there was no question that the Government was actively engaged in seeking to elicit incriminating statements by means of

Massiah's co-defendant, Colson, since the Customs investigator, who outfitted Colson's car with a radio transmitter, had instructed Colson to invite Massiah to take a ride with him and to engage him in conversation regarding the crimes with which he had been charged. *United States* v. *Massiah*, 307 F.2d 62, 66, 72 (2d Cir. 1962). *But see Beattie* v. *United States*, 377 F.2d 181 (5th Cir.), *rev'd. per curiam*, 389 U.S. 45 (1967) (summarily reversed holding that *Massiah* does not apply where defendant initiated meeting with informant at which government agent eavesdropped).*

In *Brewer* v. *Williams*, 430 U.S. 387 (1977), the Court continued to emphasize the "deliberately elicited" requirement. It found that case constitutionally indistinguishable from *Massiah* because "Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." *Id.* at 399. The Court noted that "no such constitutional protection [of the right to counsel] would have come into play if there had been no interrogation." *Id.* at 400. In the context of the *Brewer*

* In *Beattie*, Sirles, the informant, had been working with a government agent, McGinnis, prior to Beattie's arrest and had personally negotiated the unlawful sale of submachine guns that provided the basis for Beattie's indictment. When Beattie, while free on bail, requested that Sirles meet him, McGinnis equipped the informant with a radio transmitter and hid in the trunk of the informant's car with a tape recorder during the meeting. Under these circumstances, Circuit Judge Ainsworth reasoned that "the inference is inescapable that McGinnis expected appellant to incriminate himself during the meeting and that he wanted a recording of the conversations for use at the trial of the pending indictment" and that "Sirles must have realized that McGinnis wanted something incriminating out of appellant's mouth; otherwise it should have been pointless for McGinnis, with tape recorder, to hide in the trunk of Sirles's automobile." 377 F.2d at 193 (Ainsworth, C.J., dissenting). These factors indicative of purposeful efforts to obtain incriminating statements distinguish *Beattie* from the present case, in which the sole purpose for Lee's presence was to learn the identities of Wilson's accomplices and Lee had no connection to the charged crime that would render conversation regarding the pending charges a likelihood.

Moreover, it must be noted that the summary disposition of *Beattie* is not of the same precedential value as a full opinion by the Court. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). Indeed, this Court has never cited *Beattie* as authority in any subsequent opinion.

opinion, the term "interrogation" clearly was not meant as a synonym for "questioning," but rather, refers to conduct designed "to elicit information." *See id.* at 400, n. 6. Thus, the holding in *Brewer* is consistent with the line of cases applying the Sixth Amendment to extra-judicial adversarial confrontations. *See e.g., Escobedo* v. *Illinois,* 378 U.S. 478, 492 (1964) ("We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused *and its purpose is to elicit a confession*—our adversary system begins to operate and, under the circumstances here, the accused must be permitted to consult with his lawyer" [emphasis added]).

When the *Henry* majority declared that, "[w]hile affirmative interrogation, absent waiver, would certainly satisfy *Massiah,* we are not persuaded, as the Government contends, that *Brewer* v. *Williams* [citation omitted] modified *Massiah*'s 'deliberately elicited' test," [*Henry,* 447 U.S. at 271], it made clear that the reference to "interrogation" in *Brewer* should not be interpreted as a narrowing of the circumstances under which "deliberate eliciting" may be found. At the same time, it implicitly reaffirmed that *Massiah*'s requirement of "deliberate eliciting"—that is, of purposeful conduct by the government directed toward inducing a confession—has not been diminished. In *Henry,* that requirement was met by the Court's conclusion that "Nichols was not a passive listener," [*Id.* at 271], that "the informant was charged with the task of obtaining information from an accused," [*Id.* at 272, n. 10], and that "the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct." *Id.* at 274. Had there been no finding of deliberate, purposeful conduct on behalf of the Government, the application of the *Massiah* doctrine in *Henry* would have been inconsistent with the historical purposes of the Sixth Amendment, for there would have been no event at which "the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Ash,*

413 U.S. at 316. Indeed, Justice Powell's concurring opinion explicitly stated as much.*

The situation in which the informant does not induce the incriminating statements has frequently been analogized to that in which an inanimate listening device records a defendant's statements. As the Ninth Circuit held, in *United States* v. *Hearst,* 563 F.2d 1331, 1347 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978), the surreptitious recording of a defendant's conversation with a jailhouse visitor does not impinge upon Sixth Amendment rights because of "the absence of a governmental effort to elicit incriminating statements from appellant." In *United States* v. *Franklin,* 704 F.2d 1183, 1189-90 (10th Cir.), *cert. denied,* 464 U.S. 845 (1983), the Tenth Circuit, in *dictum,* reached a similar conclusion with regard to a "passive listener." It reasoned that a statement volunteered by the defendant to his former wife, who consented to have her phone tapped by the FBI, but was neither paid nor instructed to elicit incriminating information, was not deliberately elicited and, hence, was not obtained in violation of the Sixth Amendment. *Cf. State* v. *Moulton,* 481 A.2d 155 (Maine 1984), *cert. granted sub. nom. Maine* v. *Moulton,* —— U.S. ——, 105 S. Ct. 1167 (1985) (Supreme Judicial Court of Maine found *Massiah* violation where, although police intended only to investigate new crimes, transcript of secretly recorded conversation revealed that informer/co-defendant was not merely a "passive listener," but pressed defendant for details of pending charges).

The circumstances of the present case compel a similar conclusion. Detective Cullen, through his instructions to Benny Lee, cautiously avoided creating an adversarial

* It should be noted that Chief Justice Burger, the author of the *Henry* opinion, joined in a dissenting opinion that declared: "The facts and language of *Massiah, Brewer,* and *Henry* clearly support" the interpretation of the Sixth Amendment ("*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action") advanced in Justice Powell's concurring opinion in *Henry. Snead* v. *Stringer,* 454 U.S. 988, 993 (1981) (Rehnquist, J., dissenting from denial of certiorari).

confrontation between Wilson and the state that would call into play his right to counsel. *See Wilson* v. *Henderson,* 584, F.2d 1185 (2d Cir. 1978) (Pet. App. E, p. 42a) ("The instructions to Lee suggest a conscious effort on Cullen's part to guard Wilson's constitutional rights while pursuing a crucial homicide investigation"). Since, under the facts of this case, viewed in light of the presumptively correct state court findings, Wilson's incriminating statements were not the product of such a confrontation, their use at trial does not implicate the right to counsel. Therefore, this Court should hold that the purposes of the Sixth Amendment would not be served by—and do not require—the exclusion of the reliable evidence of Wilson's guilt contained in his unsolicited confession to his cellmate.

Conclusion

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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No. 84-1479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

v.

JOSEPH ALLAN WILSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Respondent respectfully submits that the issues presented for review are:

1. Whether the incriminating statements obtained from Wilson by a secret government informant under circumstances indistinguishable from those that were determinative in *United States* v. *Henry*, 447 U.S. 264 (1980), were "deliberately elicited" by the government under the principles of *Henry*? The Court of Appeals answered this question in the affirmative.

2. Whether, in view of the clear violation of Wilson's Sixth Amendment right to counsel under the holding of *Henry*, the ends of justice require a full review of the merits of Wilson's habeas corpus petition? The Court of Appeals answered this question in the affirmative.

PARTIES TO THE PROCEEDING

While the caption of the case in this Court lists the names of all the formal parties in the proceeding, Respondent notes that the State has recently transferred him from the Auburn Correctional Facility to the Clinton Correctional Facility in Dannemora, New York. The superintendent of the Clinton Correctional Facility is therefore the state official who will be affected by this Court's disposition of the case.

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FURTHER CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Article I, Section 9, Clause 2 provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. United States Code, Title 28, Section 2253 provides in pertinent part:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

3. United States Code, Title 28, Section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

The Court of Appeals for the Second Circuit, reversing the United States District Court for the Southern District of New York, held that the ends of justice required it to entertain Wilson's current habeas corpus petition. The Court of Appeals then held that *United States* v. *Henry*, 447 U.S. 264, an intervening precedent of this Court available neither to the state courts nor to the federal courts that entertained Wilson's first petition for a writ of habeas corpus, controls this case. *Henry* served to establish that Wilson's right to counsel had been denied at his trial under the principles first announced in *Massiah* v. *United States*, 377 U.S. 201 (1964). The Court of Appeals held that *Henry*, because it constituted no clear break with prior law, should be retroactively applied to *Wilson*. Under *Massiah* and *Henry*, Wilson's right to counsel was violated when the government deliberately elicited inculpatory statements from him by creating a situation likely to induce him to make such statements.

This Court should affirm the decision of the Court of Appeals because it correctly determined that Wilson's conviction was unconstitutional under principles insuring the accused's right to counsel under the Sixth Amendment. *Henry* declared that the government may not use a secret cellmate-informant to obtain evidence from a prisoner in the absence of his counsel at a time in the proceedings when it is abundantly obvious that direct interrogation would be prohibited. Nonetheless, Wilson was subjected to the company and blandishments of such an informant. Any prisoner subjected today to the treatment that Wilson received in 1970 could not lawfully be convicted on the basis of the evidence thus obtained. The fundamental concept that a person in confinement is entitled to habeas corpus relief when he has been unconstitutionally convicted impelled the Court of Appeals to rule that Wilson be released unless the State elects to retry him. The State offers no reason why, under current, applicable law, this Court should not affirm that judgment.

A. The Crime, Wilson's Arrest, and His Arraignment.

On July 4, 1970, an armed robbery of the Star Taxicab Garage in Bronx County, New York was committed during which the on-duty dispatcher was shot and killed. From photographs, three witnesses later identified Wilson, a former Star employee whose brother was still employed there, as being at the garage before the time of the robbery. Two of the three also testified to having seen Wilson after the incident running from the garage and carrying some money. (Hearing and Trial Transcript ("Tr.") at 328, 464.) The police promptly commenced a search for Wilson. (Tr. at 354-356.)

Aware that the police were looking for him, Wilson surrendered to the police on July 8. Accompanied by his brother, Wilson first went to the 42nd Detective Squad. Wilson and his brother were sent unescorted to the 44th Detective Squad where Wilson turned himself over to Detectives Cullen and Dunn. Cullen immediately arrested Wilson. (Joint Appendix ("J.A.") at 9-12.)

After receiving *Miranda* warnings (J.A. at 14-15), Wilson told Detective Cullen that, while looking for his brother, he

came upon the scene of the crime and witnessed the robbery and shooting. Wilson said that he heard the shots and saw the dispatcher's body on the floor. Wilson told Cullen that he had not participated in the robbery, but fled because he was afraid of being blamed. (J.A. at 19-20.) Wilson was placed in a detention cell in the police station overnight. (J.A. at 22-23.) The next day, July 9, 1970, counsel was assigned to represent him and he was arraigned. Wilson was then sent to the Bronx House of Detention.

B. The State's Enlistment and Use of a Secret Informant.

On July 7, 1970, the day before Wilson's voluntary surrender, Detective Cullen met with Benny Lee, an inmate of the Bronx House of Detention whom Cullen had known for five years and previously employed as an informant. He told Lee that he was investigating the crime at the Star Taxicab Garage, which he described. He showed Lee a photograph of Wilson, saying that he expected imminently to arrest Wilson as a suspect. (J.A. at 24-25.)

Detective Cullen asked Lee whether he knew Wilson and whether there was anything that Lee could do to help him with the case. (J.A. at 36.) Lee said that he had "seen him around" but did not know Wilson very well. (J.A. at 78.) Cullen then told Lee that, after arresting Wilson, he would arrange Wilson's transfer to Lee's cell in the Bronx House of Detention. Cullen asked Lee to "see if [he] could find out" from Wilson the names of the two perpetrators who had escaped identification and apprehension. (J.A. at 24.)

In accordance with the arrangement between Cullen and Lee, Wilson was transferred to Lee's cell in the Bronx House of Detention on July 13, 1970. This cell overlooked the Star Taxicab Garage, the scene of the crime. (J.A. at 80.)

Lee, who was addicted to narcotics (J.A. at 47) and was a three-time offender awaiting sentencing on a plea of guilty to a reduced charge of robbery in the third degree (J.A. at 43), had served as a police informant over 100 times. (J.A. at 95.) At Wilson's trial, defense counsel asked Lee whether he received consideration for informing on Wilson, but failed to elicit a

comprehensible answer. (J.A. at 105.) However, it is certain from Lee's testimony that he was frequently paid for his services as an informant. *Id.*

C. Events Following Wilson's Transfer to Lee's Cell.

Immediately upon his arrival at Lee's cell, Wilson was upset by the view. (J.A. at 38.) His first words to Lee were, "Somebody's messing with me because this is the place I'm accused of robbing." (J.A. at 80.) Wilson told Lee that on the night of July 4, he had gone to the Star Garage to see his brother who worked there. Two men[1] approached him near the front door. He directed them to the soda machine inside the garage, then he walked inside, talked to some people, and bought a soda. Subsequently, Wilson heard two shots and saw two men running out of the dispatcher's office stuffing money into their clothes, dropping some of it. Wilson said that he then picked up some of the money and followed the two men out of the garage and up the street. (J.A. at 38-39.)

Lee told Wilson, "Look, you better come up with a better story than that because that one doesn't sound too cool to me." (J.A. at 81.) Although Lee testified that he did not question Wilson, there can be no doubt that Lee provoked Wilson to discuss the crime of which he was accused. (J.A. at 39, 81.) Lee followed his instructions to find out, not only the identity of the two unknown suspects, but anything Wilson had to say about the crime. (J.A. at 62.) Over the next few days, Lee and Wilson "talked about different people in the street" and, under prodding from Lee, Wilson eventually altered the description of the events that he had first given. (J.A. at 81-82.) Wilson also received a visit from his brother, who told him that his family was agitated by the shooting, but there is no testimony that this visit *caused* Wilson to alter his version of the events of July

[1] Other witnesses also saw the two men and described them to the police but were unable to identify them. They were never apprehended.

4.[2] To the contrary, it was over the course of several days when, according to Lee, Wilson eventually claimed to have acted with the two unidentified men. (J.A. at 39-40.)

Wilson and Lee spent about nine or ten days together in the cell overlooking the Star Taxicab Garage. (J.A. at 81.) Lee made some notes during that time (and some much later), not revealing the identity of the two fleeing perpetrators, but supposedly capsulizing what Wilson said about the crime. (J.A. at 62.) On July 24, 1970, Detective Cullen again met with Lee at the Bronx House of Detention. Lee told Cullen that Wilson had admitted to participating in the planning and execution of the crime. (J.A. at 84.) At this meeting, Lee turned over pages on which he had made notations of "things that [he] thought would be of help to Detective Cullen." (J.A. at 99.)

Wilson, who was subsequently indicted and charged with murder and felonious possession of a weapon, moved to suppress Lee's testimony. A pretrial hearing was held pursuant to *People* v. *Huntley*, 15 N.Y.2d 72 (1965). The state court denied Wilson's suppression motion on the grounds that Lee had not "interrogated" Wilson. (J.A. at 63.) The court determined that "spontaneous" and "voluntary" utterances are admissible on the basis of two New York cases involving defendants who volunteered statements. (J.A. at 62.) It did not rely on *Massiah* v. *United States*, 377 U.S. 201 (1964). As a consequence of the state court's decision, Lee's account of his conversations with Wilson and Lee's notes were admitted into evidence at trial in the State's case against Wilson. The record shows that neither at the *Huntley* hearing, nor at trial, was Lee subjected to cross-examination with respect to facts that were relevant under the existing law of *Massiah* v. *United States*, nor under the yet-to-be-decided law of *United States* v. *Henry*. The con-

[2] The prosecution's question seeking to establish such a causal link met with an objection from defense counsel, which the court sustained. (J.A. at 42.) This supposed connection between the visit of Wilson's brother and the statements Wilson made played no part in the hearing court's decision. (J.A. at 62-63.)

clusion that Lee did not "question" Wilson rests entirely on Lee's unchallenged testimony under direct examination. (J.A. at 39.)

The jury convicted Wilson of both crimes on April 20, 1972, on the testimony of Lee and Detective Cullen and on the circumstantial evidence of the witnesses who testified that they saw him at the scene. No witness testified to having seen Wilson participate in the robbery or shooting.[3] On May 18, 1972, the court sentenced Wilson to a term of twenty years to life for the murder conviction and a concurrent term not to exceed seven years for the weapons conviction. On April 23, 1973, the Appellate Division, First Department, of the Supreme Court of the State of New York affirmed Wilson's conviction. Later, Wilson applied for leave to appeal to the Court of Appeals of the State of New York, which was denied.

D. Wilson's Initial Application for a Writ of Habeas Corpus.

On December 7, 1973, after exhausting his appeals in the courts of the State of New York, Wilson filed a *pro se* application for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming, *inter alia*, that the admission into evidence at his trial of Lee's testimony and notes violated his Sixth Amendment right to counsel. Relying on an erroneous interpretation of *Massiah* v. *United States*, under which the state trial court's finding of "no interrogation" of Wilson controlled the determination of whether his incriminating statements to Lee were deliberately elicited by the government, the District Court, Carter, J., denied his application on January 7, 1977.

On appeal, a panel of the Court of Appeals for the Second Circuit affirmed the District Court's denial of Wilson's habeas corpus petition by a two-to-one vote. *Wilson* v. *Henderson*, 584

[3] The State has never argued below, nor does it argue now, that the circumstantial evidence placing Wilson near the scene of the crime was sufficient to support his conviction. Furthermore, the State has never argued that, if Wilson's statement was erroneously admitted it was a harmless error.

F.2d 1185 (2d Cir. 1978). District Judges Blumenfeld and Mehrtens (both sitting by designation) voted to affirm the District Court's decision and to deny rehearing, while Circuit Judge Oakes voted to reverse. The Court of Appeals divided in denying rehearing *en banc*, with Circuit Judges Mansfield, Oakes, and Gurfein in dissent voting to reconsider the District Court's holding with respect to Wilson's Sixth Amendment claim. *Wilson* v. *Henderson*, 590 F.2d 408 (2d Cir. 1978). In his dissent from the denial of rehearing *en banc*, Circuit Judge Oakes noted that in *Henry* v. *United States*, 590 F.2d 544 (4th Cir. 1978), the Court of Appeals for the Fourth Circuit had recently rendered a holding "directly contrary" to the majority of the panel of the Second Circuit with respect to Wilson's Sixth Amendment claim. *Wilson* v. *Henderson*, 590 F.2d at 409 (Oakes, J., dissenting).

Wilson's petition for certiorari to this Court was denied without opinion. *Wilson* v. *Henderson*, 442 U.S. 945 (1979).[4]

E. The Inception of Wilson's Current Application for a Writ of Habeas Corpus.

Less than four months after this Court denied certiorari in Wilson's case, it granted certiorari in *United States* v. *Henry*, 444 U.S. 824 (1979).[5] This Court went on to affirm the decision of the Court of Appeals for the Fourth Circuit, which held that the government's evidentiary use of incriminating statements obtained from an indicted, in-custody defendant by his fellow inmate, a secret government informant, violated the accused's Sixth Amendment right to counsel. *United States* v. *Henry*, 447 U.S. 264. Court-appointed counsel for Wilson commenced proceedings in the courts of the State of New York in an unsuccessful effort to obtain relief on the strength of *Henry*. All state court remedies were exhausted as follows: On Sep-

[4] Subsequent federal courts correctly accorded no weight to this denial of certiorari. *Brown* v. *Allen*, 344 U.S. 443, 497 (1953) (Frankfurter, J.).

[5] This Court denied Wilson's petition for certiorari on June 18, 1979 and granted certiorari in *Henry* on October 1, 1979.

tember 11, 1981, Wilson moved the Supreme Court of the State of New York, Bronx County, to vacate his conviction pursuant to New York Criminal Procedure Law § 440.10 (the State's habeas corpus statute) on the ground that *Henry* established that his conviction had been obtained in violation of his Sixth Amendment right to counsel. The motion was denied by order dated November 20, 1981. The Appellate Division of the Supreme Court, First Department, denied Wilson's motion for leave to appeal the November 1981 order on January 19, 1982.

On July 6, 1982, Wilson brought his current petition for a writ of habeas corpus to the United States District Court for the Southern District of New York on the ground that his Sixth Amendment right to counsel had been violated. In this petition, Wilson demonstrated that the test this Court promulgated in *Henry* and all relevant considerations supported the application to his case of the principles of earlier announced in *Massiah*. The District Court, Gagliardi, J., denied Wilson's petition by opinion and order dated March 30, 1983.

The District Court interpreted *Henry* to require evidence of an "affirmative effort on the part of [the informant] to elicit" incriminating statements from the accused. (Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("Cert. Petition"), Appendix C, at 28a.) It noted its agreement with that part of Justice Powell's concurring opinion in *Henry*, 447 U.S. at 276, in which the Justice interpreted the majority's holding to require that "the informant's actions constituted deliberate and 'surreptitious interrogatio[n]' of the defendant." (Cert. Petition, Appendix C, at 29a.) The District Court distinguished *Wilson* from *Henry*, noting that Lee had not made an "affirmative effort" to question Wilson. Because of its holding that Wilson's case was distinguishable from *Henry*, the District Court did not decide whether the holding of *Henry* should be retroactively applied to this case.

F. Wilson's Appeal from the District Court's Denial of His Current Application.

On May 8, 1983, Wilson moved the District Court for the Southern District of New York for a certificate of probable

cause to appeal to the Court of Appeals for the Second Circuit the denial of his petition for habeas corpus. The District Court, Gagliardi, J., denied the motion, issuing a Memorandum Endorsement on May 12, 1983 to the effect that the "retroactivity" issue deserved appellate attention, but could not be appealed because the District Court had not reached it, having found *Wilson* distinguishable from *Henry*.

Wilson then moved the Court of Appeals for the Second Circuit for a certificate of probable cause, by a notice of motion dated June 10, 1983. A panel comprising Chief Justice Feinberg and Circuit Judges Oakes and Pierce granted the certificate of probable cause on December 14, 1983. In doing so, the panel also implicitly rejected the State's argument that Wilson's second petition for a writ of habeas corpus should not be entertained under 28 U.S.C. § 2244(b).

Another panel of the Court of Appeals for the Second Circuit heard argument of the appeal on April 5, 1974. This panel consisted of Circuit Judges Timbers, Van Graafeiland, and Cardamone. The majority of the panel reversed the District Court in a decision rendered on August 27, 1984. *Wilson* v. *Henderson*, 742 F.2d 741 (2d Cir. 1984). The Court of Appeals held that, under *Henry*, the government had deliberately elicited incriminating statements from Wilson in violation of his Sixth Amendment right to counsel. 742 F.2d at 745.

The Court of Appeals also held that *Henry* established no new rule that would preclude its retrospective application. Accordingly, the holding of *Henry* applied to Wilson's case, even though Wilson's conviction occurred before *Henry* was decided. 742 F.2d at 747. Recognizing that *Henry* is fully applicable to *Wilson*, the court held that Wilson's conviction on the basis of incriminating statements elicited by the government through a secret jailhouse informant necessarily trampled his Sixth Amendment right to counsel, and ordered that Wilson be released from custody unless the State elects to try him anew. 742 F.2d at 748.

SUMMARY OF THE ARGUMENT

Wilson was convicted on the basis of evidence obtained in the absence of his counsel in a manner that this Court has recog-

nized to be unconstitutional in *United States* v. *Henry*, 447 U.S. 264 (1980). The Court of Appeals granted relief to Wilson holding that *Henry* constitutes an applicable precedent, and recognizing that the federal courts that considered Wilson's prior application did not have the learning of *Henry* before them. Even though a court may decline to entertain a second petition for habeas corpus, the Court of Appeals decided to entertain Wilson's current petition because the intervening decision of *Henry* led it to conclude that the ends of justice would thus be served.

In reaching this conclusion, the Court of Appeals acted in accordance with *Sanders* v. *United States*, 373 U.S. 1 (1963), where this Court held that a federal court may decline to entertain a successive petition only if a further review of the petitioner's claim would not serve the ends of justice. The ends-of-justice analysis is inherent in the statute that codified the principles of *Sanders* for state prisoners, 28 U.S.C. § 2244(b), even though the words "ends of justice" do not appear there. This is evident from the discretionary language used in the statute, its legislative history, and its treatment by this Court and the lower federal courts. In order to justify its argument that the Court of Appeals should be reversed, the State has proposed grafting a preclusive rule onto the judicial and statutory framework described by *Sanders* and § 2244(b), which would effect a change not sanctioned by Congress or practice, and probably is in derogation of the privilege of the writ of habeas corpus guaranteed in the United States Constitution. (Article I, § 9, cl. 2.) Because the State's proposed preclusive rule lacks any support in existing law, this Court should refuse to embrace it.

The decision of the Court of Appeals to hear Wilson's claim served the ends of justice even if Wilson's current petition offers no "new ground" for relief under *Sanders* other than the intervening decision of *Henry*. *Henry* is an applicable, indistinguishable precedent of this Court with a direct bearing on Wilson's claim; this supports a review by the federal courts of a successive petition for habeas corpus. *Henry* also illuminates the error of the courts that previously entertained Wilson's

claim, holding that when the government creates a situation likely to induce the accused to make an inculpatory statement, the introduction at trial of the evidence thus obtained constitutes a violation of the accused's right to counsel. At the very least, *Henry* provides a "differential basis" on which to examine Wilson's Sixth Amendment claim that, under the practice of the lower federal courts, justifies the court in entertaining Wilson's current petition.

The record of this case fully supports the decision of the Court of Appeals to grant relief to Wilson in light of *Henry*. The record shows that the state trial court found that Wilson was not interrogated, but that court drew the wrong legal conclusion, as *Henry* now makes plain, because the lack of interrogation is not determinative under the correct constitutional standard. The State argues that Wilson's case is distinguishable from *Henry*. The State bases this contention on a slavish reading of the decision of the New York State trial court, which reached its factual and legal conclusions before *Henry* was decided and without reference to existing federal constitutional precedents. Under *Henry*, it is apparent that the state trial court should have inquired whether the government created a situation likely to induce Wilson to confess. This Court held that the facts of *Henry* revealed such a situation; the facts of *Wilson* make an even stronger case that the government deliberately elicited an inculpatory statement from Wilson.

The Court of Appeals concluded that *Henry* and *Wilson* are indistinguishable on the facts, and that this entitles Wilson to relief. The Court of Appeals differed from the state trial court in its conclusions regarding a mixed question of law and fact, but that difference is appropriate notwithstanding 28 U.S.C. § 2254(d), which requires the federal court to defer to the state court only on matters of historical fact. The Court of Appeals need not have deferred to those parts of the state trial court's decision in which it concluded that Wilson's right to counsel was not denied, because that is a mixed determination of law and fact. Here, the Court of Appeals based its holding on the factual record but came to a different conclusion than the prior courts because it applied the correct, rather than an erroneous,

constitutional standard. Moreover, in arriving at its determination, the Court of Appeals was not bound by the decisions of those other courts that applied the wrong legal standard, gave undue weight to certain aspects of the record, and drew erroneous conclusions.

ARGUMENT

I. The Court of Appeals Properly Discharged Its Duty to Hear Wilson's Current Application for a Writ of Habeas Corpus

The State devotes most of its argument to persuading this Court that the appropriate disposition of Wilson's current petition is a summary dismissal under 28 U.S.C. § 2244(b). Neither the District Court nor the Court of Appeals accepted the State's argument. In the District Court, the State argued that *Henry* did not change the law, and "[t]he present petition should therefore be dismissed pursuant to 28 U.S.C.A. § 2244(b). . . ." (State's Memorandum of Law in Opposition to Wilson's Application, at 6.) The District Court implicitly rejected this approach when it entertained Wilson's claim.[6]

In the Court of Appeals, the State argued, without specifically citing 28 U.S.C. § 2244(b) but relying on *Sanders* v. *United States*, 373 U.S. 1 (1963), that "this Court should accord controlling weight to its prior determination and should reject appellant's present claim without any further consideration of its merits." The two different panels of the Court of Appeals that examined Wilson's case refused summarily to dismiss it. First, the three judges that granted Wilson's motion for a certificate of probable cause recognized in Wilson's claim a potentially meritorious appeal deserving of review. The certificate obliged the Court of Appeals to review the District Court's rejection of Wilson's application. *Barefoot* v. *Estelle*, 463 U.S. 880, 888 (1983) ("if an appellant persuades an appropriate

[6] In the context of § 2244(b), a federal district court "entertains" a habeas corpus application when, after examining it and the accompanying papers, the court concludes that a hearing on the legal or factual merits is proper. *Brown* v. *Allen*, 443 U.S. 433, 461 (1953).

tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits"), *citing Garrison* v. *Patterson*, 391 U.S. 464, 466 (1968). Second, the majority of the panel that considered Wilson's appeal and reversed the District Court fully addressed the State's finality argument and dispensed with it: "The State urges that there must be an end to litigation on Wilson's claim. This argument will hardly halt the inexorable rising and falling of the legal tides." *Wilson* v. *Henderson*, 742 F.2d at 743.[7]

A. The Rule the State Proposes Is Unfounded.

The District Court entertained Wilson's application and the Court of Appeals heard Wilson's appeal in accordance with established practice under this Court's precedents and the applicable statutory rules governing the maintenance of successive habeas corpus petitions. In *Smith* v. *Yeager*, 393 U.S. 122, 125 (1968) (per curiam), this Court held that a state prisoner was entitled to bring a second petition for habeas corpus when an intervening decision of the Court made it plain that one aspect of his first application, his right to an evidentiary hearing, had previously been judged by the wrong constitutional standard. There the Court cited both *Sanders* v. *United States* and 28 U.S.C. § 2244(b). As the Court's ruling in *Smith* v. *Yeager* establishes, the State's proposal to curtail the discretion and jurisdiction of the federal courts to hear successive habeas corpus petitions is groundless, relying on an incorrect interpretation of *Sanders* and § 2244(b).

The federal courts' jurisdiction over an application for a writ of habeas corpus arises from a state prisoner's allegation of unconstitutional confinement. 28 U.S.C. § 2254(a); *Brown* v. *Allen*, 344 U.S. 443, 461 (1953) (opinion of the Court). The federal habeas corpus jurisdiction is marked by wide power, initially received by the common law, later enlarged by Con-

[7] Circuit Judge Van Graafeiland, dissenting, disagreed with the majority's decision to exercise its discretion under the principles set forth in *Sanders* v. *United States*. *Wilson* v. *Henderson*, 742 F.2d at 748-749.

gress, and expansively interpreted by this Court over the course of time. *Developments in the Law*, 83 Harv. L. Rev. 1038, 1272-1273 (1970). In *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court canvassed the development of the writ of habeas corpus and held that if the petitioner's imprisonment is constitutionally intolerable, the petitioner is entitled to relief.[8] 372 U.S. at 414-415. The Court's language, explaining the historical dimensions of the writ, remains as commanding today as it was twenty-three years ago. "[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." 372 U.S. at 424.

The State urges this Court now to adopt a rule that is inimical to the very nature of the habeas corpus remedy[9] and in opposition to its historical development:

> . . . a federal court *must consider itself without discretion* to reconsider an identical claim already fully litigated by the state prisoner on the merits, in a prior federal habeas action, because the "ends of justice" *can never warrant* such an unreasonable and unnecessary perpetuation of the non-finality of a state criminal conviction.

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[8] In *Wainwright* v. *Sykes*, 433 U.S. 72, 87-88 (1977), the Court restricted the applicability of habeas corpus relief in cases where the petitioner has failed to satisfy a state procedural rule, trimming certain dictum of *Fay* v. *Noia* that would have extended the right of state prisoners to challenge their convictions by raising federal contentions not raised below in violation of the state rule. The Court left intact the right of the state prisoner to challenge his conviction on the basis of federal contentions incorrectly decided by the state court. *Id.*; *see also Brown* v. *Allen*, 344 U.S. at 462-464.

[9] "*[H]abeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank* v. *Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

Petitioner's Brief at 11 (emphasis added). What the State characterizes as a "generally firm" or "generalized rule of issue preclusion" would be, in effect a *per se* rule,[10] one that the State has devised without reference to existing law. It suffers from several fundamental infirmities, any one of which is fatal. First, it contravenes and misconstrues this Court's principal precedent governing successive habeas corpus petitions; second, it would yield a result directly contrary to 28 U.S.C. § 2244(b) and at odds with this statute's legislative history; and third, it unjustifiably restricts the guarantee of the privilege of habeas corpus found in the Suspension Clause.

1. The State's Proposed Rule Contravenes *Sanders*.

The chief precedent governing successive habeas corpus petitions is *Sanders* v. *United States*, which, as the State concedes, is adverse to its proposed rule. (Petitioner's Brief at 11.) *Sanders* established that:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

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[10] *See Woodard* v. *Hutchins*, 464 U.S. 377, 383 (1984) (White and Stevens, JJ., dissenting). In *Hutchins*, the Court vacated a stay of execution because the prisoner made no attempt to explain why he had not earlier raised his habeas corpus claim. Justices White and Stevens pointed out that the Court's approach "comes very close to a holding that a second petition for habeas corpus should be considered as an abuse of the writ and for that reason need not be otherwise addressed on the merits. *We are not now prepared to accept such a per se rule.*" *Id.* (emphasis added). This Court previously rejected, for the purposes of habeas corpus, the rule of "law of the case," which is another way of saying "issue preclusion." *Davis* v. *United States*, 417 U.S. 333, 342 (1974). There, the Court noted that a prior determination on direct review, as well as a prior determination on a habeas corpus petition, did not bar a petitioner from seeking relief on the strength of an intervening precedent.

373 U.S. at 15.[11] The Court arrived at this conclusion not only as an interpretation of 28 U.S.C. § 2244 (1948), but as a crystallization of "the *judicial and* statutory evolution of the principles governing successive applications. . . ."[12] *Id.* (emphasis added). The *Sanders* Court observed that § 2244 itself was merely a codification of what had gone before, that the codification of § 2244 "was not intended to change the law as judicially evolved," and that it did not enact a rigid rule. 373 U.S. at 11-12.

The "three-pronged test" (Petitioner's Brief at 18) of *Sanders* provides guidance for the lower federal courts. 373 U.S. at 15. In the case of a successive petition that is not patently meritless, the lower court may dismiss the petition summarily *only if* all three prongs of the test are satisfied. The third prong is satisfied if "the ends of justice would not be served" by the court's entertaining the petition, and clearly contains a discretionary component: "the test is 'the ends of justice' and it cannot be too finely particularized." 373 U.S. at 17. In conformity with prior law, the Court left open to the sound judicial discretion of the lower courts the resolution of cases where the petitioner asks the Court to revisit a claim rooted in the same

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[11] This standard applies only to cases that have some apparent merit. *Id.* The State has never contended that this petition should be dismissed at the threshold as being obviously without merit.

[12] The State's contention that *Sanders* was solely an exercise in statutory interpretation (Petitioner's Brief at 18) is therefore incorrect. Moreover, the *Sanders* test is directly relevant to state prisoners petitioning for habeas corpus. While *Sanders* involved a proceeding under 28 U.S.C. § 2255, the principles governing successive applications for relief are the same with respect to federal and state prisoners. 373 U.S. 14-15; *see also Kaufman* v. *United States*, 394 U.S. 217, 227 (1969) (the scope of collateral attack is the same in federal habeas corpus cases involving challenges to state convictions as it is in § 2255 cases except with respect to the presumption regarding federal fact-finding procedures). Finally, the State's sidelong reference to the above-quoted language as "dictum" (Petitioner's Brief at 11) is a plain attempt to disparage the central teaching of the case, which is diametrically opposed to the State's current proposal.

"ground" as an earlier petition. *See Salinger* v. *Loisel*, 265 U.S. 224, 231 (1924) (disposal of a successive petition for habeas corpus lies in the discretion of the federal court to consider "whatever has a rational bearing on the propriety of the discharge sought"). Thus, the *Sanders* Court said: "If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law *or some other justification* for having failed to raise a crucial point or argument in the prior application." 373 U.S. at 17 (emphasis added). Within this language is a component of discretion in deciding *what* serves the ends of justice, as well as the completely separate and long-recognized element of discretion to decide *whether* to hear the petition in any event. *See Brown* v. *Allen*, 344 U.S. at 464 (the federal court must exercise at least a limited jurisdiction at the outset to decide whether to hold a hearing); *Price* v. *Johnston*, 334 U.S. 266, 284 (1948); Petitioner's Brief at 24 ("recognizing that the 'need not entertain' language of section 2244(b) is suggestive of a residual, discretionary power in the federal courts to reconsider an identical claim . . .").

Since the federal court is permitted to decline to entertain a petition for habeas corpus only if the ends of justice will not be served, it follows that it is forbidden so to decline if the ends of justice would be served by a review. The State's proposed rule turns this on its head by requiring the court to deny the petition. Instead, the rule is, as it should be, that when the ends of justice warrant a review of a successive petition, the federal court has a duty to undertake it.[13]

Sanders has continued to be the leading case setting forth the standards governing successive habeas corpus petitions.

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[13] "Thus, for example, if on a subsequent application for habeas corpus relief a State court prisoner asserts that he has newly discovered evidence relating to an alleged denial of a Federal right, the *court would be obliged to entertain* the writ provided it was satisfied that the prisoner had not . . . abused the writ." S. Rep. No. 1797, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3663, 3664 (relating to the enactment of 28 U.S.C. § 2244(b) (1966) (emphasis added)).

As recently as 1983, this Court cited *Sanders* as direct support for Rule 9(b) of the Rules Governing Cases and Proceedings under § 2254, which codifies the learning of *Sanders*. *Barefoot* v. *Estelle*, 463 U.S. at 895; *see* Advisory Committee Note, Rule 9(b), 28 U.S.C.A. foll. § 2254, at 1138 (1977), *quoting Sanders*, 373 U.S. at 15 (the "three-pronged test"); *see also Rose* v. *Lundy*, 455 U.S. 509, 521 (1982) (citing *Sanders* as the basis for Rule 9(b), particulary with respect to its abuse-of-the-writ principles). There is nothing in this Court's subsequent jurisprudence, nor that of the lower federal courts, to cast doubt on the vitality of *Sanders*, including the ends-of-justice language inherent in its three-pronged test.

Perhaps the first suggestion anywhere that the ends-of-justice analysis is "outmoded" and "statutorily unjustified" comes from the State in this case. (Petitioner's Brief at 23.) Except for the argument, refuted below (see *infra*, § IA2), that Congress changed the *Sanders* test for state prisoners when it enacted 28 U.S.C. § 2244(b), the State provides no authority for its assertion that *Sanders* is "no longer applicable" (Petitioner's Brief at 23) to the extent that it mandates the ends-of-justice analysis.

The State attempts to analogize its proposed summary preclusion rule to the rule of *Stone* v. *Powell*, 428 U.S. 465 (1976). (Petitioner's Brief at 25.) However, *Stone* v. *Powell* is not applicable to this case. In *Henry* this Court implicitly rejected, for purposes of decisions following the Sixth Amendment principles of *Massiah*, the *Stone* v. *Powell* "balancing" approach suggested in the dissent. *See* 447 U.S. at 296 (Rehnquist, J., dissenting).[14] Since then, the central purpose of the *Stone* v. *Powell* approach in Fourth Amendment cases has been distinguished from the approach appropriate in Fifth or Sixth

[14] Moreover, the question of whether the bar of *Stone* v. *Powell* should apply to habeas corpus petitions raising Sixth Amendment claims is not among the issues before this Court, and is one upon which the Court has recently declined to express an opinion when it was not an issue presented. *Nix* v. *Williams*, 467 U.S. 431, 104 S.Ct. 2501, 2512 n. 7 (1984).

Amendment cases, as follows: "Many Fifth and Sixth Amendment claims arise in the context of challenges to the fairness of a trial or to the integrity of the factfinding process. In contrast, Fourth Amendment claims uniformly involve evidence that is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.'" *Brewer* v. *Williams*, 430 U.S. 387, 414 (1977) (Powell, J., concurring). Because "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 241 (1973), the considerations applicable to the latter should not be imported here, where Wilson complains of a violation of his right to counsel.[15]

2. The State's Proposed Rule Conflicts with § 2244(b).

The State's principal argument for eliminating the ends-of-justice prong of *Sanders* is that when, in 1966, Congress amended 28 U.S.C. § 2244 (1948), it added § 2244(b) specifically governing prisoners under state sentence without alluding to the "ends of justice." This amendment does not, however, provide that a federal court may not undertake a review of the merits of a successive habeas corpus petition when the ends of justice warrant it. On its face, the language of § 2244(b) merely pretermits a basis for *declining*[16] to entertain a successive

[15] The right to the assistance of counsel at the critical stages of the criminal proceeding affects the determination of truth, for "denial of the right must almost invariably deny a fair trial." *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967); *see also Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (1968); *Tehan* v. *United States*, 382 U.S. 406, 416 (1966). Thus, the danger of releasing an "obviously guilty" defendant (Petitioner's Brief at 12) is not one typically present in a Sixth Amendment case, nor, Wilson submits, is it present here.

[16] For this reason the "ends-of-justice" element of the test is not a "loophole" allowing the Court to take jurisdiction irresponsibly, as the State contends (Petitioner's Brief at 21), but a requirement that a court have a thoughtful reason for dismissing a petition. The State has suggested no reason to believe that the district courts wish to entertain more successive habeas corpus petitions than absolutely necessary. Thus there is no need for a rule restraining the district court's jurisdiction when they already have the appropriate guidance from *Sanders* and § 2244(b).

petition: "a subsequent application for a writ of habeas corpus . . . *need not* be entertained by a court of the United States. . . ." 28 U.S.C. § 2244(b) (emphasis added). For this reason, the State's conclusion (that a federal court must dismiss the petition) is wrong even if, as the State suggests, the three-pronged test of *Sanders* was shorn of one prong in 1966. The State's proposal ignores the layer of discretion that would be left in the *Sanders* test even if the required ends-of-justice analysis were excised. This discretion is evident in the language of § 2244(b), following *Sanders*, which allows summary dismissal in certain cases, but never mandates it. In other words, the language of § 2244(b) undeniabiy leaves intact the Court's discretion on the issue of *whether* to entertain the petition. *Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1152 (1970) ("the habeas judge still has discretion to permit an application when the 'ends of justice' require it" notwithstanding the language absent from § 2244(b)).

Congress did not intend, in 1966, to put an end to the authority of the federal courts to undertake an ends-of-justice analysis. There is nothing in the legislative history of § 2244(b) to establish a link, as the State suggests (Petitioner's Brief at 19-20), between the enactment of § 2244(b) without the ends-of-justice language and Congress's expressed intent to introduce "a qualified application of the doctrine of res judicata" to state habeas corpus litigation. S. Rep. No. 1797, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3663, 3664. The quoted statement apparently refers to the enactment of subsection (c), which does introduce a degree of finality, not found in *Sanders*, for cases that have actually been previously adjudicated by the Supreme Court. Note, *Amendments to Habeas Corpus Act*, 45 Tex. L. Rev. 592, 595 (1967). Subsection (b) introduces no new element, qualified or otherwise, of *res judicata*.[17]

[17] *Fay* v. *Noia* confirmed "the familiar principle that *res judicata* is inapplicable in habeas proceedings." 372 U.S. at 423; *see also Allen* v. *McCurry*, 449 U.S. 90, 98 n. 12 (1980); *Preiser* v. *Rodriguez*, 411 U.S. 475, 497 (1973); *Sanders* v. *United States*, 373 U.S. at 7 ("At common law, the denial by a court or judge of an application for habeas corpus was not *res judicata*"); *Salinger* v. *Loisel*, 265 U.S. 224, 230 (1924). The doctrine of collateral estoppel also does not limit habeas corpus proceedings. *See, e.g., Hardwick* v. *Doolittle*, 558 F.2d 292, 295 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978). The State's proposed rule would import strict principles of *res judicata* into the federal courts' consideration of successive habeas corpus petitions when this Court has consistently held such principles to be alien to the writ.

Accordingly, Congress's enactment of 28 U.S.C. § 2244(b) did not tip the scales in favor of the finality of state court convictions over the substantial rights of the applicant, or even place these competing considerations on an equal footing.[18] Rather, Congress intended to equip the federal courts with the means to deal summarily with certain blatant abuses of the habeas corpus process while perpetuating the principle announced in *Sanders* that the federal courts have a duty to conduct a full review of a successive habeas corpus petition if the ends of justice would be served. 373 U.S. at 18-19; *see also Neil* v. *Biggers*, 409 U.S. 188, 191 (1972) ("§ 2244(b) shields against senseless repetition of claims by state prisoners without endangering the principle that each is entitled, other limitations aside, to a redetermination of his federal claims by a federal court on habeas corpus").

The legislative history of Rule 9(b) of the Rules Governing Cases and Proceedings under 28 U.S.C. § 2254, enacted ten years after 28 U.S.C. § 2244(b), confirms the vitality of the *Sanders* principle. *See* H.R. Rep. No. 1471, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 2478, 2481-82 (citing *Sanders* v. *United States* and 28 U.S.C. § 2244(b)). The Advisory Committee also made clear that in 1976 the three-pronged test of *Sanders* was intact. First, in its notes accompanying Rule 9(b), the Committee quoted the test

[18] Congress was, in fact, assured that the proposed amendment "safeguards all the substantial rights of the applicant for the writ." S.Rep. No. 1797, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S.Code Cong. & Ad. News 3663, 3667 (letter of Orie L. Phillips, C.J., to Joseph D. Tydings, U.S. Senator).

including the ends-of-justice language.[19] Advisory Committee Note, Rule 9(b), 28 U.S.C.A. foll. § 2254, at 1138 (1977). Then it observed: "*Sanders*, 28 U.S.C. § 2244, and subdivision (b) [of Rule 9] make it clear that the court has discretion to entertain a successive application," and further, "Subdivision (b) is consistent with the important and well established purpose of habeas corpus. It does not eliminate a remedy to which the petitioner is rightfully entitled." *Id.* at 1139.

All this evidence of legislative intent shows that, both in 1966 and in 1976, Congress meant to follow *Sanders* with respect to state prisoners, not to overrule it as the State contends. As the State itself notes, the federal courts have acted according to the holding of *Sanders*, and continue to apply the ends-of-justice analysis to successive petitions of state prisoners in a practice this Court has recently acknowledged. *Antone* v. *Dugger*, 465 U.S. 200 (1984) ("The [district] court concluded that the 'ends of justice' would not be served by reconsideration of the claims that had been raised on the first petition for habeas corpus." 465 U.S. at 204. "Nor has applicant shown any basis for disagreeing with the finding of the District Court and the Court of Appeals that the ends of justice would not be served. . . ." 465 U.S. at 206).

The universal practice in the Courts of Appeals has been to treat the *Sanders* test, specifically including the ends-of-justice analysis, as coextensive with the provisions of § 2244(b) and Rule 9(b). *Miller* v. *Bordenkircher*, 764 F.2d 245, 249 (4th Cir. 1985) ("This test is essentially the same as that now codified in Rule 9(b)"); *Raulerson* v. *Wainwright*, 753 F.2d 869, 874 (11th Cir. 1985) (the Rule would "bar reconsideration of this claim unless Petitioner can establish that the ends of justice would be served"); *Walker* v. *Lockhart*, 726 F.2d 1238, 1242 (8th

[19] The State notes that the Advisory Committee quoted the language of *Sanders*'s three-part test, and then states that there is no "suggestion" that the ends-of-justice requirement "survived." (Petitioner's Brief at 20-21, footnote.) The Committee's quotation of the full test, with the ends-of-justice language, would seem to be suggestion enough of its vitality.

Cir.), *cert. dismissed*, 105 S. Ct. 17 (1984) ("The general effect of rule 9(b) and section 2244(b) is to codify the criteria outlined in *Sanders*"[20]); *Sinclair* v. *Blackburn*, 599 F.2d 673, 675 (5th Cir. 1979), *cert. denied*, 444 U.S. 1023 (1980); *St. Pierre* v. *Helgemoe*, 545 F.2d 1306, 1308 (1st Cir. 1976) ("Congress implicitly assumed that the rule in *Sanders* would survive" despite the enactment of § 2244(b) without the ends-of-justice language); *United States ex rel. Townsend* v. *Twomey*, 452 F.2d 350, 355 (7th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972); *Cancino* v. *Craven*, 467 F.2d 1243, 1246 (9th Cir. 1972) (the denial of the second petition on the basis of the denial of the first, pursuant to § 2244(b), was "erroneous because the third condition of *Sanders* was not met"); *United States ex rel. Schnitzler* v. *Follette*, 406 F.2d 319, 321 (2nd Cir.), *cert. denied*, 395 U.S. 926 (1969) (the Supreme Court defined the discretion of the district courts in *Sanders* in terms applicable to cases governed by § 2244(b)). Apparently, no court has cast serious doubt on the correctness of giving due regard to the ends of justice when deciding whether to review a successive habeas corpus petition.[21]

3. The State's Proposed Rule Unjustifiably Restricts the Privilege of Habeas Corpus.

Another fatal difficulty for the State's proposed rule is that it runs afoul of the Suspension Clause, which provides: "The

[20] The court assumed the ends-of-justice test had been incorporated. *Id.* Even without it, the court noted, "substantial discretion remains in the federal courts." *Id.* note 10.

[21] The State's contention that the enactment of § 2244(b) without the ends-of-justice language has caused "confusion" (Petitioner's Brief at 22) is quite overstated. It has occasionally caused the courts to pause to consider the statutory language. Petitioner cites two decisions of Courts of Appeals that confronted the statutory language of § 2244(b) and concluded that Congress intended not to interfere with the power of the federal courts to consider the second habeas corpus petition when the ends of justice require it. *Walker* v. *Lockhart*, 726 F.2d at 242 n. 10; *St. Pierre* v. *Helgemoe*, 545 F.2d at 1307-1308. The commentators, including those petitioner cites, agree. (Petitioner's Brief at 22.)

Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." United States Constitution, Article I, § 9, cl. 2. In *Sanders*, this Court commented on the enactment of the original 28 U.S.C. § 2244 (1948), observing that Congress deliberately conformed it to the dimensions of the writ of habeas corpus at common law: "Moreover, if construed to derogate from the traditional liberality of the writ of habeas corpus, . . . § 2244 might raise serious constitutional questions" under the Suspension Clause. 373 U.S. at 11-12. The *Sanders* Court also drew attention[22] to the proposition in *Fay* v. *Noia* that "the Constitution invites, if it does not compel, . . . a generous construction of the power of the federal courts to dispense the writ conformably with common-law practice." 372 U.S. at 406; *see also Brown* v. *Allen*, 344 U.S. at 498-499 (Frankfurter, J.) (it would be "an abuse to deal too casually and too lightly" with the federal rights enforceable through the habeas corpus jurisdiction of the district courts).

None of the State's arguments indicates a firm congressional determination to diminish the common-law scope of the writ by enacting § 2244(b) and, by so doing, to tread very close to, if not beyond, the limit of what the Suspension Clause will allow. *See Brown* v. *Allen*, 344 U.S. at 450 (with respect to a suggested interpretation of 28 U.S.C. § 2254 that would have curtailed habeas corpus for state prisoners, the Court was "unwilling to conclude without a definite congressional direction that so radical a change was intended"). The ends-of-justice test "frequently is the most important factor to be considered by a court in determining whether to entertain a subsequent application based on an issue previously determined. Indeed, this requirement is essentially a restatement of the fundamental purpose of habeas corpus." Williamson, *Federal Habeas Corpus: Limitations on Successive Applications from the Same Prisoner*, 15 Wm. & Mary L. Rev. 265, 273-274 (1973). To the extent that such an inquiry is inherent in the writ and may not be within the power of the legislature to foreclose, this Court should not now infer legislative intent without a more explicit direction from Congress.

[22] The Court found precedent indicating that "the Framers' understanding [was] that congressional refusal to permit the federal courts to accord the writ its full common-law scope as we have described it might constitute an unconstitutional suspension of the privilege of the writ." *Fay* v. *Noia*, 372 U.S. at 406, *citing McNally* v. *Hill*, 293 U.S. 131, 135 (1934) (Stone, J.); *Ex Parte Yerger*, 8 Wall. 85, 95 (1868) (Chase, C.J.).

Moreover, none of the State's arguments concerning the importance of finality provides a basis for this Court to diminish the power, secured by the Suspension Clause, of the federal courts to dispense the writ. Last term, in *Reed* v. *Ross*, 104 S.Ct. 2901 (1984), this Court heard and rejected the argument that the importance of the finality of state court proceedings, without more, should supersede considerations underpinning the writ of habeas corpus.[23] There, the Court said, with respect to the cause-and-prejudice standard[24] imposed in cases where the petitioner failed to comply with a state procedural requirement but later sought habeas corpus relief on the basis of a novel constitutional claim:

> It is true that finality will be disserved if the federal courts reopen a state prisoner's case, even to review claims that were so novel when the cases were in state court that no one would have recognized them. This Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254.

[23] "Plainly the interest in finality is the same with regard to both federal and state prisoners." *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969). The State's proposal to interject into the habeas corpus scheme differing "notions of finality" for state and federal prisoners rebels against this principle, which is central to the writ. *Id.*

[24] The cause-and-prejudice standard is not applicable here. In any event, that standard would not preclude Wilson's habeas corpus petition. In *Engle* v. *Issac*, 456 U.S. 107, 135 (1982) this Court expressed confidence that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard. . . ."

104 S.Ct. at 2910; *compare Engle* v. *Issac*, 456 U.S. 107, 128 (1982) ("particularly high" costs to society where prisoner has bypassed a state procedural rule); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 265 (1973) (Powell, J., concurring) ("This case involves only a relatively narrow aspect of the appropriate reach of habeas corpus. . . . the extent to which a state prisoner may obtain federal habeas corpus review of a Fourth Amendment claim"). Accordingly, finality alone is not a policy that outweighs the constitutionally guaranteed privilege of the writ of habeas corpus.

B. It Served the Ends of Justice for the Court of Appeals to Hear Wilson's Current Application.

Citing the often-repeated admonition that conventional notions of finality must yield when there is an allegation of unconstitutional confinement, *Sanders* v. *United States*, 373 U.S. at 8, *Davis* v. *United States*, 417 U.S. 333, 342 (1974), *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969), the Court of Appeals determined that "the 'ends of justice' require a consideration of the merits of [Wilson's] present application."[25] *Wilson* v. *Henderson*, 742 F.2d at 743. The ends-of-justice inquiry necessarily focuses on whether there is some reason for the court to entertain a successive petition that does not present a new ground.[26] Arguably, Wilson's current petition is not

[25] The correctness of the court's decision to entertain Wilson's current petition does not depend on whether Wilson now advances the "same ground," *Sanders* v. *United States*, 373 U.S. at 16, or "substantially the same ground," *Wilson* v. *Henderson*, 742 F.2d at 743, as he did in his prior petition. If Wilson now advances a "different ground," any inquiry into the ends of justice is obviated, and the court must entertain the petition assuming he committed no abuse, as the State concedes. (Petitioner's Brief at 25, footnote.) If Wilson now advances the same ground, then *Sanders* required the court to undertake the ends-of-justice inquiry.

[26] Contrary to the State's argument (Petitioner's Brief at 10-11, a petition that alleges "no new ground," *see Sanders* v. *United States*, 373 U.S. at 16 ("By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant") is not necessarily

based on the same ground as his earlier petition because of the intervening decision of this Court in *United States* v. *Henry*. "Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Sanders* v. *United States*, 373 U.S. at 16. *See St. Pierre* v. *Helgemoe*, 545 F.2d at 1308 (where the Court of Appeals held that an intervening development in the law created a new ground for the petitioner's application).[27]

In *Sanders* this Court offered two examples of instances in which the ends of justice would mandate a review of a petition that alleges no new ground (lack of fairness in finding facts, and, when purely legal questions are involved, a change in the law), although the catalogue was not exhaustive. 373 U.S. at 17. When the issue is one of law, it is open to the applicant to show "some other justification for having failed to raise a crucial point or argument in the prior application." *Id.*

Assuming that Wilson raises no "new ground" under *Sanders*, any one of three bases would justify the ends-of-justice decision of the Courts of Appeals to entertain Wilson's current petition. First, while *Henry* may not have changed the law sufficiently to require an inquiry into the factors governing the retroactivity of a new constitutional rule, *Henry* is a sufficient change in the law to require a reexamination of Wilson's ground for habeas corpus relief. Second, the federal and state courts that reviewed the prior application for relief were plainly in error in light of *Henry*, an intervening, indistinguishable precedent, clarifying the law applicable to Wilson's case. Third, the intervening decision provides a differential basis on which to consider the current petition.

"identical" to the prior petition. Wilson's current application is not identical to his previous petition because he now rests his claim for relief in large part on the strength of *Henry*, which was not previously available.

[27] In *St. Pierre*, the Court of Appeals for the First Circuit further held that an applicant's claim that he is entitled to relief under a significant new decision "is enough to surmount the hurdle of § 2244(b)" because it is a "new ground." 545 F.2d at 1309.

1. *Henry* Was an Intervening Development in the Law Warranting a Review of Wilson's Current Application.

It is abundantly clear from the opinion of the Court of Appeals that its discussion of the "change in the law" was strictly confined to the question of retroactivity.[28] 742 F.2d at 746-747. The State assumes without justification that a "change in the law" for purposes of the ends of justice is the same as a "change in the law" for purposes of retroactivity, and that the determination of the Court of Appeals on the second issue is conclusive as to the former issue. (Petitioner's Brief at 30.) Since the concerns governing the concept of retroactivity are altogether different from those governing the writ of habeas corpus,[29] the concept of a "change" must be different in the two different contexts. *Kaufman* v. *United States*, 394 U.S. at 228-229.

In *Kaufman*, this Court rejected the position "that the weight to be accorded the benefits of finality is as controlling in

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[28] The Court of Appeals correctly held, in a conclusion unchallenged by the State (*see* Petitioner's Brief at 30-31), that since *Henry* did not announce a "new" constitutional principle it perforce applies "retroactively" to cases, such as Wilson's, decided before *Henry*. 742 F.2d at 746-747; *see*, *United States* v. *Johnson*, 457 U.S. 537, 549 (1982); *Robinson* v. *Neil*, 409 U.S. 505, 507-508 (1973). In *Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (1968) (per curiam) (where this Court granted relief on the basis of a Sixth Amendment decision handed down long after the prisoner's conviction), this Court arrived at the conclusion that the right to counsel is of such importance that relief was automatically called for when a later decision made it manifest that this right had been denied at a critical stage of the proceedings.

[29] There is thus no cause for concern that "the state prisoner who files a successive writ [will be] in a better situation than a first-time habeas petitioner." (Petitioner's Brief at 24, footnote.) In the case of a retroactive rule of law, the first-time petitioner as well as the successive petitioner will enjoy the protections of the decision, irrespective of when the application for relief is made. In the case of a non-retroactive, "new" rule of law, the prisoner would have the benefit of it on collateral attack neither before nor after the date of the decision.

the context of post-conviction relief as in the context of retroactive relief."[30] 394 U.S. at 229. Distinguishing the two, the Court further stated: "collateral relief, *unlike retroactive relief*, contributes to the present vitality of all constitutional rights. . . ." *Id.* (emphasis added). In *Desist* v. *United States*, 394 U.S. 244, 248-249 (1969), decided the same day as *Kaufman*, this Court defined a "new" constitutional rule for the purposes of retroactivity, as one representing "a clear break with the past." There, Justice Harlan separately ventured the observation that "quite different factors" should govern the question of retroactivity of a "new" rule in habeas corpus cases as compared to other kinds of cases. 394 U.S. at 260-261 (dissenting). In *United States* v. *Johnson*, 457 U.S. 537 (1982), the Court later identified three of the situations in which a "new" rule might emerge. First, a decision of this Court may explicitly overrule an existing precedent; second, it may overturn a longstanding and widespread practice approved by near-unanimous lower court authority; and third, it may disapprove a practice arguably sanctioned in prior cases. 457 U.S. at 551.

In contrast, a successive petition for habeas corpus may be maintained on the strength of a less momentous development in the law. *See*, *e.g.*, *Smith* v. *Yeager*, 393 U.S. at 125; *see also* *Alford* v. *North Carolina*, 405 F.2d 340, 343 (4th Cir. 1968), *rev'd on other grounds*, 400 U.S. 25, 39 (1970).[31] Thus, those cases in which the Court develops, clarifies, or modifies the law by applying "settled precedents to new and different factual situations," *United States* v. *Johnson*, 457 U.S. at 549, may

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[30] Justice Black offered this position in his dissenting opinion. There, he nonetheless agreed with the majority that the scope of collateral attack is the same for a federal prisoner proceeding under § 2255 as for a state prisoner. 394 U.S. at 233 (Black, J., dissenting).

[31] In reversing the Court of Appeals, this Court did not address the lower courts' decision to entertain the successive petition, even though *United States* v. *Jackson*, 390 U.S. 570 (1968), the intervening precedent on which the petitioner based his successive petition for habeas corpus, "established no new test." *North Carolina* v. *Alford*, 400 U.S. at 31.

provide a basis for the courts' examination of a successive habeas corpus petition.

Despite the pronouncement of the court below that *Henry* did not change the law for purposes of retroactivity, *Henry* represents a development in the law that obligated the district court to entertain Wilson's current petition. As a decision of this Court, *Henry* served to develop, clarify, or modify the principles first announced in *Massiah*. *See Henry*, 447 U.S. at 279 (Blackmum and White, JJ., dissenting). The central issue raised by *Henry* (whether there can be "deliberate elicitation" of incriminating statements from the accused without interrogation by the government's agent) had not been resolved by the Court's decisions in *Massiah* v. *United States*, 377 U.S. 201, and *Brewer* v. *Williams*, 430 U.S. 387.

In *Massiah*, decided sixteen years before *Henry*, federal agents had instructed Massiah's co-defendant to engage Massiah in a conversation about the crime. While Massiah and his codefendant spoke, the government agents listened to the defendant's conversation by means of a hidden radio transmitter. *United States* v. *Massiah*, 307 F.2d 62, 66 (2d Cir. 1962), *rev'd*, 377 U.S. 201 (1964). This Court substantially adopted the view of Circuit Judge Hays, dissenting from the decision of the Court of Appeals for the Second Circuit, in which he characterized the activities of the government agents and their informant as "indirect and surreptitious interrogation." 307 F.2d at 72; 377 U.S. at 206.

Brewer involved an even more direct elicitation of incriminating statements from the accused. In that case, a state detective delivered the "Christian burial speech" to a defendant, whom he knew to be deeply religious, in breach of an express agreement with the defendant's counsel that there would be no discussion of the crime in his absence. 430 U.S. at 391-393. In *Brewer*, once again, the Court characterized the conduct at issue as interrogation. 430 U.S. at 400-401.

About one year after the Court rendered its decision in *Brewer*, the Courts of Appeals for the Second and Fourth Circuits, respectively, rendered decisions in *Wilson* and in

Henry. In *Wilson*, the majority of the Second Circuit panel interpreted *Brewer* as requiring a showing that there had been interrogation of the accused:

> The complete absence of interrogation in this case negates the proposition that Wilson's statement was deliberately elicited. According to *Brewer*, constitutional protection would not attach under these circumstances.

Wilson v. *Henderson*, 584 F.2d 1185, 1190 (2d Cir. 1978). In *Henry*, on the other hand, the Fourth Circuit panel majority interpreted *Brewer* as "not restricted to formalized oral interrogation" and held that deliberate elicitation[32] by an undisclosed government informant might be accomplished "by association, by general conversation, or both." *Henry* v. *United States*, 590 F.2d at 547.

This Court's opinion in *Henry* thus altered the scope of the legal inquiry that must be undertaken to determine the issue of deliberate elicitation. In *Henry*, this Court held that the appropriate inquiry under the Sixth Amendment is whether the government intentionally created "a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel." 447 U.S. at 274. Contrary to the decisions of the state trial court, of the federal courts that heard Wilson's first petition for habeas corpus, and of the District Court that heard his current petition, neither actual interrogation nor an overt "affirmative effort . . . to elicit incriminating information" (Cert. Petition, Appendix C, at 28a) from the accused is an essential element of "deliberate elicitation" under *Henry*. This Court explicitly rejected in *Henry* the government's contention that the accused's statements were not deliberately elicited because they were "not the result of any affirmative conduct on the part of Government agents to elicit

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[32] Earlier the court had noted its opinion that " 'interrogation' is a relative term" and that "[a]n undisclosed government agent may effectively 'interrogate' a defendant by simply engaging the defendant in a general conversation and if the response is a confession of guilt, the agent need not make any further more pointed inquiries." 590 F.2d at 547.

evidence." 447 U.S. at 269-272. Indeed, there apparently was no evidence of such affirmative conduct in the record in *Henry*. The informant did not divulge the content of his conversations with Henry; the only evidence as to the informant's conduct was his admission that he had "some conversations with Mr. Henry." 447 U.S. at 271. As in *Wilson*, the informant in *Henry* had been instructed not to interrogate the accused. *Henry* v. *United States*, 590 F.2d at 547.

As the court below correctly pointed out, "the courts considering this matter earlier did not have the benefit of the *Henry* decision as we now do." 742 F.2d at 747. Without it, those courts were adrift, applying the wrong standard and arriving at the wrong conclusion. *Id.* In this situation, the ends of justice required that the federal court entertain Wilson's current application.

2. The Courts That Previously Examined Wilson's Application Were Plainly in Error.

Inasmuch as the components of the ends of justice "cannnot be too finely particularized," *Sanders* v. *United States*, code 373 U.S. at 17, this Court has given the lower federal courts room to decide when a habeas corpus petition should be reviewed under this "prong." Two Courts of Appeals have held that "[t]he ends of justice are not served by refusal to consider the merits of the second application when denial of the first rested on a court's plain errors of law." *Cancino* v. *Craven*, 467 F.2d 1243, 1246 (9th Cir. 1972); *Bass* v. *Wainwright*, 675 F.2d 1204, 1207 (11th Cir. 1982); *see also Johnson* v. *Wainwright*, 702 F.2d 909, 911 (11th Cir. 1983). None of these cases depended on a "change in the law."

Even if the decision in *United States* v. *Henry* represented no change in the law, then it at least reveals the plain error the federal courts committed in their consideration of Wilson's first petition. As more fully explained below (*see infra*, § IIA), *Henry* is an indistinguishable governing precedent deciding the same "ground" that was before the District Court and the Court of Appeals on Wilson's first application. In *Henry*, this Court affirmed the decision of the Court of Appeals for the

Fourth Circuit to grant a writ of habeas corpus. The federal courts that heard Wilson's first petition were overruled by *Henry* and their decisions revealed as plain error. *See infra* § IIA2. Under these circumstances, it was correct for the Court of Appeals to conclude that a review of Wilson's current petition would serve the ends of justice.

3. *Henry* Provides a Differential Basis upon Which to Review Wilson's Current Application.

Although this Court has not previously addressed the question, at least two Courts of Appeals have suggested that there can be a basis, beyond the two examples set out in *Sanders*, for a federal court to entertain a successive habeas corpus petition, if the applicant can offer some "other" element that was not present in the earlier petition. *United States ex rel. Townsend* v. *Twomey*, 452 F.2d at 355 ("Our reading of *Sanders* v. *United States*, *supra*, convinces us of the necessity of some *differential basis* before a district court may in the exercise of sound discretion properly consider the successive habeas corpus petition") (emphasis added); *United States ex rel. Schnitzler* v. *Follette*, 406 F.2d at 321 (there were no new facts nor a "change" in the law, "nor do we see *any other ground* upon which a rehearing" could be justified) (emphasis added).[33] These courts, implicitly recognizing the existence of other potential bases for entertaining a successive petition, undoubtedly rely on the *Sanders* Court's phrase, "some other justification for having failed to raise a crucial point of argument in the prior application." 373 U.S. at 17.

The State cannot gainsay that the decision in *United States* v. *Henry* introduces a new element that was not previously available to Wilson. Even supposing, as the State insists, that upon close examination *Henry* is not determinative of Wilson's claim (Petitioner's Brief at 43-46), *Henry* is unquestionably a development in, or clarification of, the law that has "a direct and

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[33] In each case the Court of Appeals held that the District Court had exceeded its discretion by entertaining a successive application containing no new aspect.

substantial bearing upon the constitutional issues underlying" Wilson's claim. *See Vanhook* v. *Craven*, 419 F.2d 1295, 1296 (9th Cir. 1969). This alone would justify further inquiry into Wilson's case and provide a basis for a federal court to entertain his successive petition. *Smith* v. *Yeager*, 393 U.S. at 125 (where this Court mandated that an evidentiary hearing be held on the second habeas corpus petition when that petition relied on the intervening decision of *Townsend* v. *Sain*, 372 U.S. 293 (1963), which "substantially increased the availability of evidentiary hearings in habeas corpus proceedings").

II. Wilson Is Entitled to Relief under *United States* v. *Henry*

On Wilson's motion to suppress Benny Lee's testimony and notes, the state trial court conducted a hearing pursuant to *People* v. *Huntley*, 15 N.Y.2d 72 (1965) to determine the facts and to rule on Wilson's claim. At the conclusion of the *Huntley* hearing, the state trial court made only one factual finding that it considered determinative, that Lee, the state's informant did not "interrogate" Wilson:

> This Court finds that he, Lee, so acted and, accordingly, no interrogation was conducted by Lee of the defendant at the time they were cellmates.

(J.A. at 63.) What led the court to this finding, and what the court recited prior to announcing this finding, was that Lee asked no direct questions of Wilson. (J.A. at 62.)

On the basis of its finding of "no interrogation," the court concluded that Wilson's statements were "spontaneous" and "voluntary." To support this legal conclusion, the court relied on two decisions of the Court of Appeals of the State of New York: *People* v. *Mirenda*, 23 N.Y.2d 439, 449 (1969); and *People* v. *Kaye*, 25 N.Y.2d 139, 145 (1969). In the former of these two cases, the highest court of New York held that an informant who actually interrogated his cellmate violated the accused's Sixth Amendment rights. In the latter, the court considered the case of a "talkative person in custody" who was clearly not

interrogated, and held that his rights had not been violated.[34] Given these two cases, the state trial court obviously believed that the pivotal question in determining whether to grant the motion was whether Wilson was interrogated or not. It did not consider whether Wilson's being prompted to change his story by an informant who had been instructed to extract information from him, or the government's placing Wilson in a cell overlooking the scene of the crime, or the subtle psychological inducements of proximity to and confidence in his cellmate were factors that caused Wilson to talk to Lee in the absence of his counsel.

The *Henry* Court held, in contrast, that a court must determine from the facts whether they amount to the creation by the government of a situation likely to induce the prisoner to make an inculpatory statement in the absence of his counsel. 447 U.S. at 270-271. The issue raised by Wilson's current habeas corpus petition, whether the government "deliberately elicted" incriminating statements in the absence of his counsel under *Massiah* and *Henry*, involves the application of the law as announced by this Court to the historical facts. In considering this issue and in granting Wilson's petition for habeas corpus, the Court of Appeals did not redetermine or dispute the state court's factual finding concerning Lee's conversations with Wilson. 742 F.2d at 747-748. Rather, on the issue of deliberate elicitation, it refused to accord controlling significance to the absence of "interrogation," an error that every previous court

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[34] The state trial court's reliance on *Kaye* was misplaced since that was a case involving the defendant's rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n. 4 (1980), this Court distinguished the notion of "interrogation" under the Fifth and Sixth Amendments, as follows: ". . . the right to counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."

had made when considering the merits of Wilson's Sixth Amendment claim. Moreover, nothing in 28 U.S.C. § 2254(d) precludes the Court of Appeals from drawing the mixed conclusion of law and fact that the State derogated Wilson's right to counsel when it obtained and used at trial the evidence of the secret cellmate informant.

A. *Wilson* Is Indistinguishable from *Henry*.

With the exception of the District Court that considered the current petition, those who have compared *Wilson* with *Henry* have noted that the two cases are indistinguishable. *United States* v. *Henry*, 447 U.S. at 281 (Blackmun and White, JJ., dissenting); *Wilson* v. *Henderson*, 590 F.2d 408, 409 (2d Cir. 1978) (Oakes, J., dissenting); *Henry* v. *United States*, 590 F.2d 544, 553 (4th Cir. 1978) (Russell, J., dissenting) ("Certainly, there can be no distinction drawn between this case and *Wilson*. In fact, if anything, the facts in that case were more favorable to the defendant's claim than are the facts in this case"); *United States* v. *Sampol*, 636 F.2d 621, 637-638 (D.C. Cir. 1980) (allegations "virtually identical").

1. The *Henry* Test Focuses on Whether the Government Created a Situation Likely to Induce the Accused to Make an Inculpatory Statement.

This Court's opinion in *United States* v. *Henry*, 447 U.S. 264, identified the circumstances under which the government violated the accused's Sixth Amendment right to counsel by procuring incriminating statements from him through the use of an undisclosed informant:

> Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

447 U.S. at 270. The presence of these factors led this Court to hold: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth

Amendment right to counsel." 447 U.S. at 274. This holding and the three underlying factors cited by the *Henry* Court provide the determinative test as to whether the government has deliberately elicited incriminating statements from an indicted, in-custody defendant.

With this test, this Court adopted a totality-of-the-circumstances approach in *Henry*. The *Henry* Court stated:

> An accused speaking to a known Government agent is typically aware that his statements may be used against him. . . . When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents.

447 U.S. at 273 (distinguishing Fifth from Sixth Amendment concerns). It focused on the circumstances contributing to the likelihood of "elicitation," such as the "powerful psychological inducements to reach for aid when . . . in confinement," the "pressures on the accused," and the "subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." 447 U.S. at 274. The focal point of its analysis was not questioning, but rather the "restrictive nature of the jailhouse setting" and Henry's "confidence in Nichols."

Under the *Henry* test, a court need not, and indeed should not, attempt to pinpoint a single stimulus for the accused's statements.[35] In most cases, it would be impossible to arrive at

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[35] In affirming *Henry*, this Court expressly rejected the government's contention that a finding of interrogation or equivalent verbal conduct by the government or its agent was a necessary element of a violation of the accused's Sixth Amendment right to counsel under its sixteen-year-old decision in *Massiah* v. *United States*, 377 U.S. 201. *See United States* v. *Henry*, 447 U.S. at 271. Certain language ("tantamount to interrogation") in the Court's decision in *Brewer* v. *Williams*, 430 U.S. at 400, had previously raised this issue, which had remained unresolved prior to this Court's *Henry* decision. *Compare Henry* v. *United States*, 590 F.2d at 546-547 (Winter, J.) *with Henry* v. *United States*, 590 F.2d at 548-550 (Russel, J., dissenting).

a reliable determination as to exactly what motivated the informant and what prompted the accused to make incriminating statements to the informant. The Supreme Court therefore adopted an objective test. *See, e.g., United States* v. *Harris*, 738 F.2d 1068, 1071 (9th Cir. 1984). After *Henry*, any inquiry into whether there was deliberate elicitation necessarily reduces to an objective consideration of the steps the government took to create a situation intended to induce the accused to confess, and the likelihood that, under the circumstances, the government's stratagem would have that effect.

2. Under *Henry*, the State Deliberately Elicited Wilson's Inculpatory Statement.

In *Henry*, the government's direct activity consisted of the single act of enlisting a jailhouse informant to obtain information from the accused. In Wilson's case, the government's direct activity was more manipulative. First, Detective Cullen asked Lee whether there was *anything* that Lee could do to help him with the case (J.A. at 36) and specifically requested that Lee "find out" from Wilson the identities of the other two alleged perpetrators of the crime. (J.A. at 24.) Lee had been placed in a cell with a view of the scene of Wilson's alleged crime. Cullen arranged to have Wilson placed in that cell, too. (J.A. at 80.) Lee, concededly acting as Cullen's agent, then undertook to find out not only information about the two unidentified perpetrators of the crime, but also the details of Wilson's supposed participation in the crime. (J.A. at 62.) Lee clearly prompted Wilson to speak and to incriminate himself when Wilson initially offered an exculpatory account. (J.A. at 39, 81.) In *Henry*, there was no more evidence of questioning or "interrogation" by the informant than this in *Wilson*. *Henry* v. *United States*, 590 F.2d at 547.

Lee was not a mere "passive listener" as the State contends. (Petitioner's Brief at 44.) Lee admitted in the record to having conversations with Wilson (which is all the informant did in *Henry*), and from Lee's choice of words, it is obvious that his conversational sallies were provocative. First, Lee testified, "I think I remember telling him that the story wasn't—it didn't sound too good. Things didn't look good for him." (J.A. at 39.)

Second, Lee testified, "Well, I said, look, you better come up with a better story than that because that one doesn't sound too cool to me, that's what I said."[36] (J.A. at 81.) By this provocation, Lee used his position to elicit inculpatory statements from Wilson, and Wilson's remarks were the product of his propinquity to Lee in the cell overlooking the Star Taxicab Garage. *See Wilson* v. *Henderson*, 742 F.2d at 745 ("The instant case cannot be held to be equivalent to one where an informant merely sits back and makes no effort to stimulate conversations with the suspect about the crime charged"). This case therefore does not raise the issue left undecided by this Court in *Henry*, 447 U.S. at 271 n. 9, where a "listening post" is used to overhear the accused's remarks. If anything there is more evidence of "elicitation" in this case than in *Henry*, where the informant was on record only as having "some conversations with Mr. Henry." 447 U.S. at 267. Indeed, the *Henry* Court suggested that simple association between the informant and the accused could constitute deliberate elicitation. 447 U.S. at 269, 273.

The Court of Appeals below reached the conclusion that Wilson's statement had been deliberately elicited based on these facts, all of which were part of the state court record: that Lee was placed in Wilson's cell to function as a surreptitious government informant; that Wilson's cell overlooked the scene of his alleged crime and made him uneasy; and that Lee's conversations with Wilson served to exaggerate Wilson's already-troubled state of mind. In *Henry*, this Court pointed to similar facts that demonstrated that the informant's activities were in direct derogation of Henry's right to counsel with the government's connivance, even though the investigating officer disclaimed asking the informant to take "affirmative steps" to

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[36] The State argues in a footnote (Petitioner's Brief at 41) that the latter testimony should not be considered here because it was not before the state trial court during the *Huntley* hearing. This argument ignores the fact that the second statement is but a paraphrase of the first, which is testimony that unquestionably was before the court during the hearing. (J.A. at 39.) It is not evidence offered as the basis of a claim whose substance was not presented to the state court, as in *Picard* v. *Connor*, 404 U.S. 270 (1971), on which the State relies.

secure information: the informant was in the same cellblock as the accused; he was known to have had a year's experience serving as a government informant; and he was compensated only if he produced useful information. 447 U.S. at 270.

A comparison of the facts of *Wilson* with those of *Henry* shows that Wilson has an even more compelling case. Lee had not one but five years' experience as a government informant; he had given evidence against fellow inmates over one hundred times. (J.A. at 95.) In addition, Wilson and Lee were not total strangers. When he was shown Wilson's picture, Lee had told Detective Cullen that he "had seen [Wilson] around." (J.A. at 78.) Lee thus "had access to [Wilson] and would be able to engage him in conversations without arousing [his] suspicion." 447 U.S. at 270.

Although Lee denied being paid by the State for providing evidence against Wilson, he did admit to receiving "consideration" for his services in *every* other instance in which he served as an informant. (J.A. at 105.) In any event, the issue here is not whether Lee was a "paid informant." In *Henry*, this Court drew attention to the "contingency fee" arrangement the government used there, 447 U.S. at 270 n. 7, because it illustrated that the police created incentives making it likely that the informant would secure an incriminating statement from the accused. There can be no doubt that similar incentives existed in Wilson's case to motivate Lee.[37]

The likely existence of incentives, monetary or otherwise, also shows that the informant's "evidence" is not reliable. *Henry* protects the accused from the government's using against him statements made from motives that render those

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[37] There is reason to believe that Lee did not act out of wholly gratuitous motives. The prosecutor referred to Lee as "the paid police informer." (Tr. at 172.) Lee was a three-time offender awaiting sentencing on a guilty plea to a robbery charge when Detective Cullen enlisted him to serve as an informant. (J.A. at 43.) After providing Cullen with incriminating information against Wilson, Lee unexplainedly acquired the $10,000 bail that had been set in his case, and was freed pending his sentencing hearing. (J.A. at 90.)

statements unreliable. For instance, the accused may exaggerate or even fabricate his involvement in criminal activity in a misplaced effort to impress his fellow inmates. *See, e.g., United States* v. *Sampol*, 636 F.2d at 635 (accused told the secret inmate-informant "that he had plans to take motor boats, load them with explosives and by use of remote control blow up Russian ships in American harbors. He also talked about attempts he had made on the life of Fidel Castro"). The type of statements rendered inadmissible by *Henry* are those most susceptible to distortion due to inaccurate reporting by an informant with an obvious interest in producing incriminating statements to demonstrate his success. *See Wilson* v. *Henderson*, 584 F.2d at 1194 (Oakes, J., dissenting). Because such statements purportedly were uttered by the accused, they are likely to weigh heavily in the determination of guilt. These considerations led the highest court of one state to opine that "[a]nytime a *Massiah* violation occurs, at least in a custodial setting, the validity of the evidence produced will be suspect." *Idaho* v. *LePage*, 102 Idaho 387, 630 P.2d 674, 678, *cert. denied*, 454 U.S. 1057 (1981).

Finally, the *Henry* Court noted "the powerful psychological inducements to reach for aid when a person is in confinement . . . the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." 447 U.S. at 274. If the mere fact of confinement has an inducive effect, a much greater effect must have resulted from Wilson's confinement in a cell with a view of the scene of the terrible crime he was accused of perpetrating. The efficacy of this not-so-"subtle influence" was demonstrated by Wilson's immediate reaction to it: he became apprehensive ("somebody's messing with me") and "very upset" (J.A. at 80, 38) and he spoke about the robbery and shooting on that very first day that he and Lee shared that cell. *Id.* There was thus abundant support in the record for the Court of Appeals to conclude that *Henry* and *Wilson* are indistinguishable.

B. The Court of Appeals Correctly Determined Wilson's Sixth Amendment Claim.

The State's argument on the merits of Wilson's Sixth Amendment claim consists of rewriting the historical facts,[38] then defending those "facts" as presumptively correct. That attempt to distinguish *Henry* incorrectly relies on legal conclusions of the state trial court which in turn relied on legal principles that were rethought five years ago in *Henry*. The Court of Appeals properly deferred to the historical facts found by the state court in accordance with 28 U.S.C. § 2254(d) and gave those facts the appropriate weight under *Henry*. The Court of Appeals did not defer to the legal conclusions or to the mixed determinations of law and fact of the state and other federal courts; § 2254(d) does not require it to do so. "[T]he state courts' view of the merits was not entitled to conclusive weight." *Fay* v. *Noia*, 372 U.S. at 421. This must be especially so when the state court has expressed its view on federal constitutional issues: the courts' conclusion cannot then be *res judicata*. 372 U.S. at 422. In short, "a state prisoner's challenge to the trial court's resolution of dispositive federal issues is always fair game on federal habeas." *Wainwright* v. *Sykes*, 433

[38] The State has strained the record in its zeal to show that the Court of Appeals refound the historical facts, which it did not do. The State principally takes issue with four sentences of the opinion of the Court of Appeals (Petitioner's Brief at 40-41), while ignoring the following facts with fair support in the record, which the Court of Appeals was entitled to rely on: (1) Cullen asked Lee broadly "if there was anything that [he] knew about it or anything that [he] could do to help him with the case" (J.A. at 36), and Lee listened to and took note of "what the defendant had to say with respect to the crime in question" (J.A. at 62), in no way limiting himself to the identity of the unknown suspects; (2) Wilson was unquestionably upset by being moved to the cell with a view of the scene of the crime (J.A. at 38), and that this was surely a factor in the control of the police; (3) Lee prompted and encouraged Wilson to change his story (J.A. at 39); and (4) it took only about two days for Wilson finally to tell an inculpatory version of his story (J.A. at 40) after Lee's expressions of disbelief. (J.A. at 81.)

U.S. 72, 79 (1977); *see also Brown* v. *Allen*, 344 U.S. at 500, 506 (Frankfurter, J.).

1. The Court of Appeals Correctly Applied *Henry* to the Facts of Wilson's Case.

The correct resolution of Wilson's constitutional claim necessarily required a finding of the facts, and an application of the appropriate legal standard to the facts. *See, e.g., Marshall* v. *Lonberger*, 459 U.S. 422, 436-437 (1983); *Sumner* v. *Mata*, 449 U.S. 539, 557 (1981) (Brennan, J., dissenting); *Brewer* v. *Williams*, 430 U.S. at 403; *Brown* v. *Allen*, 344 U.S. at 507 (Frankfurter, J.). There is no dispute that the state trial court found facts, and that the "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators . . . ," *Townsend* v. *Sain*, 372 U.S. at 309 n. 6 (quoting *Brown* v. *Allen*, 344 U.S. at 506 (Frankfurter, J.)), are entitled to a presumption of correctness under § 2254(d). *Sumner* v. *Mata*, 449 U.S. at 550-551.[39]

The disagreement between the Court of Appeals and the state trial court "is not so much over the elemental facts as over the constitutional significance to be attached to them." *Neil* v. *Biggers*, 409 U.S. 188, 193 n. 3 (1972); *see also Townsend* v. *Sain*, 372 U.S. at 314 (when it is "unclear whether the state finder [of fact] applied correct constitutional standards in disposing of the claim" the merits of the claim were not "resolved" in the state hearing); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 694-695 (1973). "The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Brown* v. *Allen*, 344 U.S. at 508 (Frankfurter, J.). The primary, historical facts of this case do not themselves dispose of the Sixth Amendment question; they require assess-

[39] This Court should nonetheless undertake its own independent examination of the record when federal constitutional deprivations are alleged; this duty rests on the Court's "solemn responsibility for maintaining the Constitution inviolate." *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959), and cases cited there.

ment under the appropriate constitutional standard, *Marshall* v. *Lonberger*, 459 U.S. at 436-437, which in this case is whether Wilson's statements were deliberately elicited within the meaning of *Henry*. Mixed questions of law and fact involve "the application of legal principals to the historical facts of [the] case." *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 (1980). Thus the constitutional issue raised by Wilson involves a mixed question of law and fact, as the State concedes. (Petitioner's Brief at 37.)

Section 2254(d) does *not* apply when federal courts review state court determinations of mixed questions of law and fact, and such determinations are "open to review on collateral attack in a federal court." *Cuyler* v. *Sullivan*, 446 U.S. at 342; *see also Patton* v. *Yount*, 104 S.Ct. 2885, 2891 (1984).[40] The state trial court's holding, after finding the fact of "no interrogation," and considering what it considered to be the applicable constitutional precedents, was that "the utterances made by defendant were unsolicited, and voluntarily made and did not violate the defendant's Constitutional rights. . . ." (J.A. at 63.) After considering the same factual record, the Court of Appeals arrived at this mixed determination of law and fact:

> Since the government intentionally staged the scene that induced Wilson to make the inculpatory statements, it may be held to have deliberately elicited them in violation of Wilson's Sixth Amendment right to counsel.

742 F.2d at 745. The difference between these two holdings springs from an interpretation of the facts in light of the appropriate law. The decision of the Court of Appeals does not, despite the State's strenuous exegesis of conflicting nuances (Petitioner's Brief at 45-48), depend on a subversion of the findings of the historical facts found by the state trial court. "The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." *Townsend* v. *Sain*, 372 U.S. at 312.

The determinative issue here after *Henry*, whether the government created a situation likely to induce Wilson to make

[40] This rule has invariably been followed by the Courts of Appeals. *See*, Project, *Fourteenth Annual Review of Criminal Procedure*, 73 Geo. L.J. 751, 809 n. 3304 (1984), and numerous cases cited there.

incriminating statements in the absence of counsel, is analogous to other mixed determinations of law and fact in the Sixth Amendment context, which this Court has held to be beyond the presumption of § 2254(d). *Cuyler* v. *Sullivan*, 446 U.S. at 342; *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2070 (1984). While it "will not always be easy to separate questions of 'fact' from 'mixed questions of law and fact' for § 2254(d) purposes," *Wainwright* v. *Witt*, 105 S.Ct. 844, 855 (1985), the issue of deliberate elicitation has all the hallmarks of the latter.

In *Cuyler* v. *Sullivan*, this Court held that the question of the adequacy of representation by the accused's lawyers, due to the conflict arising from multiple representation, "is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case." 446 U.S. at 342. In *Strickland* v. *Washington*, this Court held that "a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d) . . . . Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact." 104 S.Ct. at 2070. The answers to these mixed questions resolve Sixth Amendment issues, which are comparable to those in *Henry* and in *Wilson*. They are also comparable to the Sixth Amendment issues raised by the right-to-counsel example given by Justice Frankfurter in *Brown* v. *Allen*, "[w]here the ascertainment of the historical facts does not dispose of the claim, but calls for interpretation of the legal significance of such facts." 344 U.S. at 507. There, Justice Frankfurter observed that whether the accused had counsel, or whether counsel was present, are historical facts, but whether the accused's right to counsel was denied is a mixed question. *Id.*

Even if the state trial court's conclusion regarding "voluntariness" is a historical fact,[41] the Court of Appeals acted

[41] To the contrary, the question of voluntariness is one generally thought to be a mixed question of law and fact. *Gunsby* v. *Wainwright*, 596 F.2d 654, 655 (5th Cir.), *cert. denied*, 444 U.S. 946 (1979);

within its authority by assigning weight or legal significance to the facts under *Henry*. *Cuyler* v. *Sullivan*, 446 U.S. at 342; *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (per curiam) ("In deciding this [mixed] question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard"); *see also*, *Frank* v. *Magnum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting). Indeed in *Henry*, the government characterized the accused's statements as "voluntary," 447 U.S. at 269, and the Court assigned no weight to this characterization in the Sixth Amendment right-to-counsel context. 447 U.S. at 273. If the state trial court regarded "voluntariness" (along with the absence of interrogation) as a determinative historical fact, it applied an erroneous legal test under *Henry*. *See supra* § IB1. In these circumstances, the federal court, reviewing Wilson's petition for habeas corpus would have to conclude "that the merits of the factual dispute were not resolved in the State court hearing." 28 U.S.C. § 2254(d)(1); *Townsend* v. *Sain*, 372 U.S. at 313 (remarking on the factors later codified in § 2254(d)).[42]

"The federal court cannot exclude the possibility that the trial judge believed facts which showed a deprivation of consti-

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see also, *Marshall* v. *Lonberger*, 459 U.S. at 436-437. The State also relies heavily (Petitioner's Brief at 31-32) on the state trial court's use of the words "spontaneous" and "unsolicited." From a close reading of that court's decision, it is apparent that these words, like the word "voluntary," do not refer to historical fact, but are conclusions of law and fact springing from the finding of "no interrogation" and resolving the question of "whether or not what defendant said in Lee's presence is to be suppressed." (J.A. at 63.)

[42] *Procunier* v. *Atchley*, 400 U.S. 446, 453 n. 6 (1970) ("Congress in 1966 amended 28 U.S.C. § 2254 . . . so as substantially to codify most of the habeas corpus criteria set out in *Townsend* v. *Sain*"); *see also* *Wainwright* v. *Sykes*, 433 U.S. at 80. The decision of the Court of Appeals must rest on one of the subsections of § 2254(d) only if findings of historical fact of the Court of Appeals were "at odds with" those of the state trial court. *Sumner* v. *Mata*, 455 U.S. at 598. As the Court of Appeals did not attempt to find the facts, but only recited them as they appear in the record, 742 F.2d at 742, this is not the case.

tutional rights and yet (erroneously) concluded that relief should be denied." *Townsend* v. *Sain*, 372 U.S. at 316. Thus, if the facts the State points to (Petitioner's Brief at 43-46) were determinative to the state trial court, that court's conclusion was subject to reexamination by the federal court on a writ of habeas corpus.

2. The Court of Appeals Acted within the Proper Scope of Review.

The conclusions of the district judge and the prior panel of the Court of Appeals for the Second Circuit, which, the State argues, should be binding on the panel that heard Wilson's current petition (Petitioner's Brief at 31-33), are irrelevant here. *Neil* v. *Biggers*, 409 U.S. at 193 n.3. First, the conclusion of the District Court was open to review by the appellate panel. 28 U.S.C. § 2253. An appellate court is free to substitute its own independent judgment for that of a district court and to correct any errors of law without application of the clearly erroneous test. *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982) (in the context of Fed. R. Civ. P. 52(a), the standard for review of questions of fact, mixed questions, and questions of law); *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 855 n. 15 (1982). Significantly, neither District Court that considered Wilson's claim held a factual hearing or observed any witnesses; they based their interpretation of the facts on a transcript of the state court hearing. The panel below was as competent as those courts to review the record. *See Neil* v. *Biggers*, 409 U.S. at 193 n. 3. At least there was no reason to accord the District Court's decision with the special weight given to the trier of fact that has a unique opportunity to evaluate the credibility of witnesses and to weigh the evidence. *Id.* Furthermore, the Court of Appeals had a duty to exercise its independent judgment when the lower court, applying the wrong legal standard, focused on improper factors in reaching its decision. *Neil* v. *Biggers*, 409 U.S. at 200; *see Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 1960 (1984) (Fed. R. Civ. P. 52(a) does not inhibit the power of the appellate court to correct errors of law that may infect mixed finding of law and fact).

Finally, since the law to be applied is that which is in effect at the time the appeals court renders its decision, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-282 (1969), the Court of Appeals properly determined Wilson's constitutional claim without reference to any "law of the case" of the appellate panel that examined Wilson's first petition before *Henry* was decided.[43] *Davis* v. *United States*, 417 U.S. 333, 342 (1974).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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[43] The view of the prior panel of the Court of Appeals rightly has no bearing on the second panel's exercise of legal judgment because it had no *res judicata* effect on Wilson's subsequent petition. *Sanders*, 373 U.S. at 8; *see supra*, § IA.

FOR ARGUMENT

No. 84-1479

IN THE

Supreme Court of the United States

October Term, 1985

HON. ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioner,

against

JOSEPH ALLAN WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

POINT ONE

The Court of Appeals erred in granting Wilson habeas corpus relief where the identical claim had been rejected previously after he had been allowed a full and fair opportunity to litigate that claim on the merits in an earlier habeas proceeding before a different panel of the Court of Appeals, and where there had been no intervening change in the law entitled to retroactive application on habeas corpus and no presentation of any newly-found facts which might have had a material impact on the correctness of the original habeas determination.

A. In our opening brief, we argued that the Court should announce, in its supervisory capacity over the lower federal courts, a general rule which provides that after a state pris-

oner has had one full and fair opportunity to litigate the merits of a constitutional claim in state court, and then before the federal judiciary on habeas corpus, a subsequent habeas petition by him raising the same ground should be subject to a requirement of mandatory, summary dismissal. This general rule, however, would be qualified by exceptions to presumptive finality in truly extraordinary situations, such as when the petitioner presents newly discovered and previously unavailable favorable facts which would have had an outcome determinative effect on the earlier habeas proceeding, or when there has been an intervening, significant change in the law which the petitioner can demonstrate would be accorded retroactive, collateral application if he were, instead, bringing his petition for habeas relief on for the first time. Respondent has asserted that this rule is unacceptable because it would conflict with this Court's 22-year-old decision in *Sanders* v. *United States*, 373 U.S. 1 (1963), as well as 28 U.S.C. § 2244(b) and habeas corpus Rule 9(b). Respondent also insists that such a rule would violate the Constitution's Suspension Clause (Article I, § 9, cl. 2). However, respondent's points of dispute with the sensible rule we now promote are meritless.*

1. It is true that this new rule of issue preclusion would be at odds with the rule announced previously by this Court in *Sanders* v. *United States, supra,* when, acting in a similar

* Contrary to respondent's further argument (respondent's brief, p. 13), this proposed rule of qualified issue preclusion would in no way conflict with this Court's decision in *Smith* v. *Yeager*, 393 U.S. 122 (1968), since even under our proposed rule Smith would have been allowed to pursue a second habeas action. The original denial of an evidentary hearing, and his newly alleged critical facts (393 U.S. at 124), make clear that Smith had been denied a "full and fair opportunity" to litigate the merits of his constitutional claim on the first habeas application.

supervisory role (373 U.S. at 15), it correctly read 28 U.S.C. § 2244, as it then existed, to establish a three-pronged test governing a court's right to refuse to hear a successive, repetitive habeas corpus petition. The final prong of that statutorily-required analysis provided that a federal court could dismiss a new habeas petition raising a ground previously heard and determined on the merits only when "the ends of justice would not be served by reaching the merits of . . . [the] subsequent petition." 373 U.S. at 15.

However, respondent has all but ignored that it was demonstrated in our opening brief that the *Sanders'* "ends of justice" test, which the Court of Appeals invoked in order to grant relief in this case, was rendered inapplicable to state prisoners by the Congressional amendatory enactments of 1966. At that time, state prisoners were expressly eliminated from the reach of the *Sanders* three-pronged test (now contained in 28 U.S.C. § 2244[a]), and instead relegated to the governing provisions of 28 U.S.C. § 2244(b) and (c). Because *Sanders* is really nothing more than a case of statutory interpretation as it relates to successive, repetitive petition situations, and because the statute addressed in *Sanders* is no longer applicable to state prisoners, it is of little moment that "The State's Proposed Rule Contravenes *Sanders*" (respondent's brief, pp. 15-19).

2. It was shown in our opening brief, based on a review of stated Congressional intent, that the 1966 amendment of and additions to section 2244 were effected in order to introduce "a greater degree of finality of judgments in habeas corpus proceedings" involving state prisoners. Petitioner's brief, pp. 19-20. Indeed, the alteration of the previously-existing statutory provision was undertaken to

inject into federal habeas corpus litigation a concept previously absent—"a qualified application of the doctrine of res judicata." Petitioner's brief p. 20. Respondent, however, argues that the Congressional intent to bring some greater degree of finality to habeas litigation by allowing for application of res judicata principles manifests itself only in section 2244(c), which concerns successive petitions raising issues determined previously on the merits by this Court (respondent's brief p. 20), but not in section 2244(b), which pertains to successive petitions raising claims previously determined on the merits by other, lower federal courts.

Respondent's argument about the Congressional intent in the amendment of section 2244 apparently involves a bit of wishful thinking, but is rendered inaccurate by the express language of the Senate report accompanying the enactment of subsections (b) and (c). In that report, as we noted in our opening brief (petitioner's brief p. 20), it was stated "[t]he purpose of these new *subsections* [(b) and (c)] is to add to section 2244 of title 28, United States Code, provisions for a qualified application of the doctrine of res judicata." S. Rep. 1797, 89th Cong., 2d Sess., *reprinted* in 1966 U.S. Code Cong. & Ad. News 3663, 3664 (emphasis added), Hence, it is evident, contrary to respondent's unsupported speculation, that Congress did intend to incorporate "a qualified application of the doctrine of res judicata" into section 2244(b), and that petitioner's suggested rule of qualified issue preclusion hardly conflicts with that stated goal.

3. Respondent also asserts, quite incorrectly, that when Congress promulgated Rule 9(b) of the habeas corpus rules

in 1976, it made clear that "the three-pronged test of *Sanders* was intact" (respondent's brief p. 21). Rule 9(b) merely provides that "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . ." Nothing contained therein suggests that the "ends of justice" must, as well, be considered. Although, as was pointed out in our opening brief, the Advisory Committee first took historical notice of the original, *Sanders* three-pronged test, the Committee went on to state that

> "[t]he requirement [of Rule 9(b)] is that the prior determination of the same ground is on the merits. This requirement is in 28 U.S.C. § 2244(b) and has been reiterated in many cases since Sanders." (Petitioner's brief pp. 20-21, n.).

Thus, in the end, the Advisory Committee saw fit to liken Rule 9(b) to section 2244(b), without adding that the "ends of justice" test was still extant. Certainly, if "ends of justice" analysis were a further silent, but surviving requirement, as respondent now contends, the Advisory Committee would have said so. Its refusal to make that statement confirms the deletive effect of the 1966 amendment of section 2244(b), adhered to in the enactment of Rule 9(b).

4. The only argument posited by respondent which we did not touch upon at all in our opening brief is his contention (respondent's brief, pp. 23-26) that the qualified rule of issue preclusion we now urge would run afoul of the Constitution's Suspension Clause (Article I, § 9, cl. 2), which provides that

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.

The seeds of respondent's argument are to be found in *Sanders* v. *United States,* 373 U.S. at 11-12, where the Court, citing the Suspension Clause, stated that

> . . . if construed to derogate from the traditional liberality of the writ of habeas corpus, § 2244 might raise serious constitutional questions. *Cf. Fay* v. *Noia, supra,* 373 U.S. at 406.

But respondent's reliance on this brief, speculative suggestion of unconstitutionality in *Sanders,* which cites *Fay* v. *Noia,* is clearly misplaced. For the reference in those cases to the "traditional liberality of the writ of habeas corpus" is brought into serious question by subsequent decisions of this Court, and the research of the legal scholars. *See Swain* v. *Pressley,* 430 U.S. 372, 384-386 (Burger, Ch. J., Blackmun, Rehnquist, JJ., concurring); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 252-256 (1973) (Powell, J., concurring); Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich. L. Rev. 451, 468 (1966); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 463-499 (1963); *see also, United States* v. *Hayman,* 342 U.S. 205, 210-211 (1952).

Without attempting to recapitulate the entire history of the writ of habeas corpus, we believe it to be quite clear that the Constitution's history shows that the framers did not understand the privilege of habeas corpus which they sought to protect by the Suspension Clause to extend to collateral attacks upon criminal convictions issuing from courts of competent jurisdiction. Hence, limitations upon the nature and scope of post-conviction collateral attack do not implicate the Suspension Clause. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 170 (1970).

As evidenced by the Chief Justice's concurring opinion in *Swain* v. *Pressley,* 430 U.S. at 384-386, at least three members of the Court have already expressly announced their agreement with our contention that the Suspension Clause is of no relevance when the issue is one of the expansion or diminution of the scope of federal collateral review of state criminal convictions, which emanates not from the common law, but from Congressional enactments coming long after the Constitution. We urge the entire Court to adopt the eminently sound analysis of that concurring opinion, for the compelling reasons stated therein, and thus reject respondent's ill-conceived constitutional argument.*

B. 1. Respondent's suggestion that his successive, repetitive petition did not raise the "same ground" as his earlier one, because of his reliance on a newly-decided case from this Court, *United States* v. *Henry,* 447 U.S. 264 (1980) (respondent's brief, pp. 26-27), is incorrect. The language of *Sanders* itself makes clear that respondent's repeated contention that the Sixth Amendment was violated by the manner in which his incriminating jailhouse state-

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* Indeed, to do so would accord with the actions taken by the Court in *Stone* v. *Powell,* 428 U.S. 465 (1976), where the Court substantially limited a state prisoner's opportunity to use federal habeas corpus as a vehicle for raising Fourth Amendment claims. Beyond doubt, the diminution of the availability of habeas corpus effected by *Stone* is far more substantial than the rule which we seek in this case, where a state prisoner's right to obtain one full and fair review of a federal issue on habeas corpus would remain unimpaired. Yet, in *Stone,* there was no suggestion that the Suspension Clause might somehow bar the result reached by the Court. *See also Wainwright* v. *Sykes,* 433 U.S. 72, 87-88 (1977) (no suggestion that Suspension Clause was implicated in narrowing the previously broad scope of review of habeas corpus, in situations where state prisoners failed to comply with contemporaneous objection rules, established by *Fay* v. *Noia,* 373 U.S. 391 [1963]).

ments were obtained is the "same ground" that was raised in his first petition and already rejected by the federal courts on the merits, notwithstanding his newly-added citation to *United States* v. *Henry, supra.* For under *Sanders,* as noted in our opening brief, "identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments . . . ." 373 U.S. at 16.*

2. In our opening brief we argued that even if a residual "ends of justice" exception to finality continued to exist following the 1966 amendment of section 2244(b), its application should now be guided by Congress' intent to bring a "greater degree of finality" and a "qualified application of the doctrine of res judicata" to habeas corpus litigation (petitioner's brief, pp. 33-34). Hence, we argued that our suggested qualified rule of issue preclusion should be the appropriate objective standard by which "ends of justice" determinations are to be made. This contention was founded in part on our analysis of Congressional intent, but was also made with an eye toward the increasing recognition by this Court that the lack of finality in habeas litigation involving state prisoners has had a serious negative impact on federal-state relations and on our system of justice (petitioner's brief, pp. 25-27, 33-34).

Respondent, however, has drawn liberally upon decisions of this Court rendered at a time when the scope of

* "For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion." 373 U.S. at 16.

habeas corpus review was at its broadest* to offer a divergent "ends of justice" analysis which pays no more than lip service to the pressing need for finality in habeas corpus litigation. In its distilled essence, respondent's argument suggests that whenever a subsequently-rendered decision of this Court, or a Federal Court of Appeals, contributes a new nuance to an issue of constitutional law previously heard and determined on the merits in an earlier habeas proceeding, a *de novo,* plenary reconsideration of the issue in a new habeas corpus action is warranted. In reality, respondent advocates an approach pursuant to which there would hardly ever be any real finality in habeas corpus litigation.

History and practical experience have shown us that constitutional criminal law is an ever-changing dynamic form, and that new decisions will often cast some doubt upon the absolute correctness of an earlier-rendered decision; in many instances no great skill is required to find a "differential basis" (*see* respondent's brief, pp. 33-34) in a recent decision that might serve to justify some criticism, or even a cry of "plain error" (*see* respondent's brief, pp. 32-33), concerning an earlier decision that had been rendered without the benefit of the most recent explication on a particular legal principle. But in an orderly and rational system of jurisprudence the curtain of finality must at some time fall. Perpetual, repetitious assaults on the validity of a state criminal conviction, predicated upon

* *E.g. Kaufman* v. *United States,* 394 U.S. 217 (1969) (resp. br. pp. 26, 28-29). Respondent ignores the fact that the holding and rationale of *Kaufman* were subsequently eviscerated by this Court's decision in *Stone* v. *Powell,* 428 U.S. 465, 479-481 (1976). Indeed, Justice Brennan, in his dissenting opinion in *Stone* v. *Powell,* succinctly observed that "*Kaufman* obviously does not survive." 428 U.S. at 519, n.14.

the most recent advance sheets and slip opinions, cannot be countenanced. "Absolute" truth and justice are too elusive to permit the constant re-evaluation of the correctness of earlier-issued decisions, particularly when the price to be paid involves the substantial costs to society attending the lack of finality of state criminal convictions.

In the context of this case it is particularly significant that the present argument is being heard more than 15 years after the murder of Sam Reiner, despite the fact that respondent's guilt was overwhelmingly established at trial even without regard to the jailhouse admissions in question, and his claimed constitutional error in no way impugns the accuracy of the jury's finding of guilt. Notwithstanding respondent's claims of "plain error" with respect to the earlier federal court rulings, and his reliance upon new legal precedent which offers him some support for his current constitutional arguments, on balance the "ends of justice" would have been best served by the final conclusion of this habeas corpus litigation long before now.

POINT TWO

The state court's fully supported factual finding that Wilson's statements were spontaneous and unsolicited distinguishes the present case from *United States* v. *Henry*, as well as *Maine* v. *Moulton*.

As argued in the brief for petitioner, the Court of Appeals erroneously concluded that respondent Wilson's incriminating statements were "the product of" his conversations with Benny Lee because it ignored the uncontradicted hearing testimony that Wilson's statements were

made following a disturbing visit from Wilson's brother. Rather than confront that testimony, Wilson, mimicking the Court of Appeals' purblindness, offers a comparison of the present case and *United States* v. *Henry*, 447 U.S. 264 (1980), in which every parallel aspect is emphasized and magnified, while the pronounced differences between the two cases are ignored or wished away. When the relevant portions of the record are viewed in their entirety and without distortion, however, it becomes clear that Wilson's case is constitutionally distinguishable from *Henry* and that *Henry* does not support Wilson's claim of entitlement to habeas corpus relief. It should further be recognized that this Court's recent opinion in *Maine* v. *Moulton*, 54 U.S.L.W. 4039 (Dec. 10, 1985), offers no support to Wilson's theory that his right to counsel was violated.

Wilson's effort to reshape the present case begins with his characterization of the state hearing court's decision. Notwithstanding the court's reference to "the fact that the defendant's utterances in Lee's presence were spontaneous *and* not a result of any interrogation by Lee" (J.A. 63) (emphasis added), and its declaration that "the Court finds beyond a reasonable doubt that the utterances made by defendant to Lee were unsolicited" (J.A. 63), Wilson insists that the state court "made only one factual finding that it considered determinative, that Lee . . . did not 'interrogate' Wilson" (respondent's brief, p. 34). Wilson claims that the hearing court's discussion of two New York cases, *People* v. *Mirenda*, 23 N.Y.2d 439 (1969), and *People* v. *Kaye*, 25 N.Y.2d 139 (1969), supports this constricted interpretation of the court's finding (respondent's brief, pp. 34-35). On the contrary, however, although the hearing court, in distinguishing the facts of the present

case from those of *Mirenda,* noted that in *Mirenda,* unlike the present case, there was interrogation by the cellmate, the court did not indicate that it viewed the presence or absence of interrogation as the single dispositive factor in that case. Indeed, it quoted a passage from *Mirenda* that stated a much broader holding: "Statements made by a cellmate to another deliberately placed by the prosecution in proximity to the defendant in order to get statements would be a violation of a defendant's rights." *Mirenda,* 23 N.Y.2d at 449, quoted at J.A. 63. The quoted passage in turn cited *People* v. *Robinson,* 13 N.Y.2d 296 (1963), a case in which the New York Court of Appeals held that a cellmate violated a defendant's right to counsel when, pursuant to a scheme conceived by the police, he "engaged [the defendant] in a conversation which was overheard by the police." 13 N.Y.2d at 300. Thus, the hearing court's discussion of *Mirenda* reflects its awareness that, under the controlling law, Wilson's statements could not be admitted into evidence if they were the product of deliberate elicitation by the police, regardless of whether or not there was "interrogation."

Because of that awareness, the court's determination that Wilson's case was distinguishable from *Mirenda* necessarily required an additional factual finding. Accordingly, when the hearing court, immediately after referring to *Mirenda,* stated that it was "persuaded by the fact that the defendant's utterances in Lee's presence were spontaneous and not a result of any interrogation by Lee" (J.A. 63), it was certainly referring to the finding of spontaneity as a separate and independently determinative fact. The court's ensuing discussion of *People* v. *Kaye,* in which the issue before the New York Court of Appeals was

"whether defendant's *spontaneous* oral confession must be suppressed, as a matter of law, solely because defendant was under arrest and represented by counsel at the time he volunteered his confession'"* [25 N.Y.2d at 143 (emphasis added)], further demonstrates the importance of the factual finding of spontaneity to the state court's ultimate conclusions (J.A. 63).

Wilson has coupled his misreading of the scope of the state court's factual determinations with an effort to confuse those findings with mixed questions of law and fact that are not subject to the presumption of correctness under 28 U.S.C. § 2254(d). Wilson thus belabors the uncontroverted proposition that the issue of "deliberate eliciting" is a mixed question (respondent's brief, pp. 43-47), while refusing to recognize that the underlying finding that Wilson's statements were spontaneous and unsolicited involves a determination of historical fact. As this Court recently noted, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller* v. *Fenton,* 54 U.S.L.W. 4022, 4025 (Dec. 3, 1985). Thus, the finding that the statements were "spontaneous" and "unsolicited," though closely intertwined with the ultimate constitutional issue of "deliberate eliciting," is a finding of fact, not law.

The purely factual nature of "spontaneity" is highlighted by comparing it with "voluntariness," which the Court recognized in *Miller* as a mixed question of law and fact. The Court noted that the term "involuntary" is a "convenient shorthand" for a legal determination based on application of this Court's precedents—a determination

* As the quoted passage indicates, Wilson's assertion that *Kaye* did not involve the Sixth Amendment right to counsel (respondent's brief, p. 35, n.34) is incorrect.

that involves analysis of whether the "tactics for eliciting inculpatory statements . . . fall within the broad constitutional boundaries" and not simply "whether the defendant's will was in fact overborne." 54 U.S.L.W. at 4024, 4025. Since no equivalent body of case law or constitutional principle is superimposed on the concept of "spontaneity," it is clear that a determination that a statement is spontaneous and unsolicited involves only an examination of historical causes and effects. Thus, the state court's findings in this case are entitled to the presumption of correctness pursuant to 28 U.S.C. § 2254(d).

Wilson's argument, however, would not only permit the federal courts to disregard the state hearing court's findings, but to pick and choose among the evidence in the record to fashion a version of the underlying events that conforms to the legal theory he advances. In the brief for petitioner, the State took issue with the Court of Appeals' reliance on testimony that was elicited only at trial and, therefore, was not considered by the hearing court as a basis for its decision (petitioner's brief, p. 41n.). Wilson answers the State's assertion that the evidence comprised in that testimony was never "fairly presented" to the state court with regard to the suppression issue by suggesting that there is a hitherto-unrecognized "paraphrase" exception to the doctrine of exhaustion of state remedies, under which testimony that was not fairly presented to the state court may nevertheless be considered by the federal court if it is similar to testimony that was properly before the state court (respondent's brief, p. 39, n.36). Wilson, however, does not hold himself even to his own flimsy "paraphrase" standard; rather, he liberally refers to trial evidence regarding Lee's prior experience as an informant that has no counterpart in the hearing testimony (*see* respondent's brief, p. 40). Indeed, Wilson goes so far as to rely on trial evidence to insinuate that, contrary to his hearing testimony, Lee was in fact paid for informing in the present case. *See* respondent's brief, p. 40, n.37 ("After providing Cullen with incriminating information against Wilson, Lee *unexplainedly* acquired the $10,000 bail that had been set in his case . . ." [emphasis added]). Had Wilson ventured somewhat further into the trial testimony, however, he would have noted that the acquisition of Lee's bail money was explained by Lee's testimony that his father raised the funds (J.A. 111).

Wilson's willingness to go beyond the hearing record when it suits his purposes renders particularly ironic his reluctance to address the evidence regarding the jailhouse visit by Wilson's brother. Even if Wilson were justified in his sweeping assertion that the "supposed connection between the visit of Wilson's brother and the statements Wilson made played no part in the hearing court's decision" (respondent's brief, p. 5, n.2), the evidence of that visit and its effect on Wilson was undeniably part of the record before the hearing court and, therefore, surely warrants no less attention by a habeas corpus court than the post-hearing evidence, which Wilson does not hesitate to point out to this Court. Moreover, notwithstanding the absence of a specific reference to the brother's visit in the state court's cursory one-paragraph summary of the facts (J.A. 62), that incident implicitly underlies the court's finding that Wilson's statements were spontaneous. Wilson additionally protests that "there is no testimony that this visit *caused* Wilson to alter his version of the events of July 4" (respondent's brief, p. 4) (emphasis in original). The absence of testimony establishing causation did not, however, prevent Wilson from asserting that Lee's "pro-

vocation'' caused Wilson to inculpate himself (respondent's brief, p. 39). Surely, it is incongruous that, while Wilson is willing to suggest that Lee's remarks upon hearing Wilson's initial exculpatory statement prompted the incriminating statements Wilson made several days later, he does not deign to comment on the effect of the intervening visit from Wilson's brother.

Furthermore, Wilson's assertion that a sustained objection prevented the prosecution from adducing the connection between the brother's visit and Wilson's second, inculpatory, version of the events of July 4, 1970 (respondent's brief, p. 5, n.4), is belied by the record. At the hearing, the following colloquy occurred:

> Q. [by the prosecutor] Now, Mr. Lee, during the course of this second story that the defendant gave to you, you testified that you did not question the defendant, tell his Honor how this defendant came about telling you that second story during that two or three day period after the first day that you were together in the cell.
>
> Mr. Adler: That's objected to if your Honor pleases.
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> The Court: Objection overruled.
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> A. The defendant had a visit from his brother.
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> The Court: Beg pardon? I didn't hear that.
>
> The Witness: A visit from his brother.
>
> The Court: All right.
>
> The Witness: And he was upset over the fact that his brother had come and said that his family was saying that he had killed Sam and why did he kill Sam *and this upset him very much and that would start him to talking about different things, about the crime and different things.* [J.A. 41-42]. (Emphasis added).

Clearly, the fact of Wilson's brother's visit and its relation to his subsequent incriminating statements is an integral part of the hearing evidence and Wilson's struggle to disregard it reflects his recognition of its fatal impact on his legal theory.

As Wilson observes, *Henry* requires ''objective consideration of the steps the government took to create a situation intended to induce the accused to confess and the likelihood that, under the circumstances, the government's strategem would have that effect'' (respondent's brief, p. 38). Wilson fails, however, to face the evidence that, in the present case, it was not the state's strategem, but an independent, intervening factor that had the effect of inducing Wilson to discuss his involvement in the crime. Because of that crucial distinction, the record in the present case does not support the conclusion that the incriminating statements were the ''product'' of the state's conduct. *Cf. Henry,* 447 U.S. at 271.

Where the actual stimulus for the inculpatory statements is known, it becomes unnecessary to analyze the ''likelihood'' that steps taken by the state would create a situation that might have such an effect. While *Henry* required exclusion of statements obtained because of the Goverment's intentional creation of a situation likely to induce the accused to make incriminating statements in the absence of counsel [*see* 447 U.S. at 274], it did not require exclusion of statements prompted by factors that are independent of and attenuated from such intentional and knowing conduct by the Government. *See Henry,* 447 U.S. at 276-77 (Powell, J. concurring).

Nor does the Court's recent opinion in *Maine* v. *Moulton,* 54 U.S.L.W. 4039 (December 10, 1985). There the Court held that the admission at trial of statements made to the

indicted defendant's codefendant, who was secretly cooperating with the police and wearing a recording device, violated Moulton's Sixth Amendment rights. The Court specifically noted that the statements in question were the product of the codefendant's prompting:

> Because Moulton thought of Colson only as his codefendant, Colson's engaging Moulton in active conversation about their upcoming trial was certain to elicit statements that Moulton would not intentionally reveal—and had a constitutional right not to reveal—to persons known to be police agents. Under these circumstances, Colson's merely participating in this conversation was "the functional equivalent of interrogation." *Henry,* 447 U.S. at 277 (Powell, J., concurring). In addition, the tapes disclose and the Supreme Judicial Court of Maine found that Colson "frequently pressed Moulton for details of various thefts and in so doing elicited much incriminating information that the State later used at trial." 481 A.2d at 161. Thus, as in *Henry, id.*, at 271 n.9, we need not reach the situation where the "listening post" cannot or does not participate in active conversation and prompt particular replies. 54 U.S.L.W. at 4044, n.13.

In *Moulton,* the Court recognized that "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." 54 U.S.L.W. at 4044.

When the present case is viewed in light of all the facts fairly supported by the record, and only such facts,* it is

* It should be noted that Wilson has not pointed to any support in the record for the factual portions of the Court of Appeals' opinion challenged in the brief for petitioner at pages 40-42. Although Wilson attempts to dismiss this discussion as pertaining to a mere "four sentences" of the opinion [respondent's brief, p. 42, n.38], the State maintains that the four sentences in question effect a thorough distortion of the facts involved in the present case.

clear that, unlike Moulton and Henry, Wilson was not confronted by an undisclosed agent whom law enforcement authorities "must have known" [*see Henry,* 447 U.S. at 271; *Moulton,* 54 U.S.L.W. at 4043], was likely to induce discussions about his pending criminal charges. In *Moulton,* the police knew that such discussions were inevitable because that was the express purpose for the planned meeting. *Moulton,* 54 U.S.L.W. at 4044. In *Henry,* the existence of a contingent-fee arrangement whereby the informant would be paid only for producing useful information made it inevitable that the informant would "take affirmative steps to secure incriminating information." *Henry,* 447 U.S. at 271. In the present case, however, there was no prior relationship between Lee and Wilson relating to the crime at issue that would render it inevitable or even likely that Wilson would discuss the facts of that crime with Lee, nor is there any evidence of special incentives that would inevitably lead Lee to prompt such a discussion.

Moreover, the record makes clear that Wilson's initial remarks about the crime were prompted by the happenstance of his being upset by the view from his cell window of the Star Taxicab Garage, the location where he murdered Sam Reiner.* Although Lee did not remain silent upon hearing Wilson's exculpatory story, his comments to the effect that the story "didn't sound too good" (J.A. 39), would seem more likely to induce a more convincing *exculpatory* statement than to provoke Wilson to admit his

* Contrary to Wilson's assertion [respondent's brief, p. 42, n.38], his becoming upset by the view of the scene of the crime was not a "factor in the control of the police" in any direct sense. There is nothing in the record to support the theory that the fact that the nearby garage was visible from the cell window and the fact that seeing it dramatically upset Wilson were anything more than happenstance.

guilt to his cellmate. In any event, the record makes clear that those remarks had neither effect, because Wilson "stuck to the story" (J.A. 39). Wilson only began talking about the crime again when another happenstance—the visit during which his brother communicated how distraught their family was over Wilson's role in causing Sam Reiner's death—caused Wilson again to become upset. Thus, the present case, unlike either *Henry* or *Moulton*, involves a situation in which an informant, though placed in proximity to the defendant, did not actually prompt the defendant to make the incriminating statements that were introduced against him at trial. For the reasons advanced in the State's opening brief, the use of those statements comported with the Sixth Amendment right to counsel.

Conclusion

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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January, 1986